

No. 12659

2657

United States
Court of Appeals
for the Ninth Circuit.

EDWARD D. COFFEY,

Appellant,

vs.

ANTONIO POLIMENI,

Appellee.

Transcript of Record

Appeal from the District Court,
Territory of Alaska,
Third Division

FILED

NOV 24 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorneys for Plaintiff:

McCUTCHEON & NESBETT,

Box 2392,

Anchorage, Alaska.

Attorneys for Defendant:

DAVIS & RENFREW,

Box 477,

Anchorage, Alaska.

In the District Court for the Territory of Alaska,
Third Division

No. A5366

ANTONIO POLIMENI,

Plaintiff,

vs.

EDWARD D. COFFEY,

Defendant.

COMPLAINT

The plaintiff complains of defendant and alleges:

I.

That at all times herein mentioned the plaintiff was the owner and proprietor of a restaurant in south Naknek, Third Division, Territory of Alaska, said restaurant consisting of a main building and two auxiliary buildings completely furnished and equipped and with stocks of merchandise, all with the reasonable value of Ten Thousand Dollars (\$10,000.00).

II.

That at all times herein mentioned the defendant was, and now is, engaged in the business of a general insurance agent in the City of Anchorage, Third Division, Territory of Alaska.

III.

That on the 30th day of March, 1948, plaintiff applied to defendant by letter for insurance against loss or damage by fire upon the above-described

property, and defendant, on the 9th day of April, 1948, acknowledged that application by letter and requested a description of the said property, promising plaintiff upon receipt thereof, to supply the insurance desired by plaintiff.

IV.

That in compliance with defendant's request, plaintiff, on the 17th day of April, 1948, forwarded to the defendant by letter, all of the information requested by defendant in his letter of April 9, 1948, and all information necessary to the placement of the insurance desired by plaintiff in the total amount of Ten Thousand Dollars (\$10,000.00), a copy of said letter being attached hereto, marked Exhibit "A," and made a part hereof.

V.

That the defendant received plaintiff's letter of April 17, 1948, in due course of post, but through negligence lost or misplaced same, and by reason of said negligence failed to insure plaintiff's property against loss by fire by policies of insurance in the usual form issued by defendant.

VI.

That the insurance companies represented by the defendant, by policies of insurance in the usual form issued by defendant, among other things, promise and agree to make good to the insured all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property insured.

VII.

That on or about the 20th day of July, 1948, all of the property described in paragraph I except the two auxiliary buildings was totally destroyed by fire and that, at the time of said destruction, said property was of a value in excess of the sum of Ten Thousand Dollars (\$10,000.00).

VIII.

That plaintiff at all times mentioned herein stood ready, able and willing to pay to defendant any premium moneys requested by defendant in consideration of the issuance of the policies of fire insurance requested by plaintiff and promised by defendant.

IX.

That plaintiff, during the times mentioned herein, made no attempt to procure fire insurance from any insurance agent other than defendant, and at the time of destruction of plaintiff's property there was no insurance coverage thereon.

X.

That by reason of the negligence of defendant as aforesaid, plaintiff has sustained personal loss in the sum of Ten Thousand Dollars (\$10,000.00).

And for a Separate and Second Cause of Action
Against Defendant Plaintiff Alleges:

I.

Realleges all of the allegations contained in paragraphs I, II, III, and IV of plaintiff's complaint herein.

II.

That the defendant received plaintiff's letter of April 17, 1948, in due course of post but failed, in breach of his promise, to insure plaintiff's property against loss by fire by policies of insurance in the usual form issued by defendant.

III.

That plaintiff at all times herein mentioned stood ready, able and willing to pay to defendant any premium requested by defendant in consideration of the issuance of the policies of fire insurance requested by plaintiff as promised by defendant.

IV.

That the insurance companies represented by defendant, by policies of insurance in the usual form issued by defendant, among other things, promise and agree to make good to the insured all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property insured.

V.

That on or about the 20th day of July, 1948, all of the property described in paragraph I of plaintiff's complaint except the two auxiliary buildings was totally destroyed by fire, and that, at the time of said destruction, said property was in excess of the sum of Ten Thousand Dollars (\$10,000.00).

VI.

That plaintiff, during the times mentioned herein, had made no attempt to procure fire insurance from

any insurance agent other than defendant, and at the time of destruction of the plaintiff's property there was no insurance coverage thereon.

Wherefore, plaintiff prays judgment against defendant in the sum of Ten Thousand Dollars (\$10,000.00), his cost of suit, plus a reasonable sum as allowance for attorney's fees.

McCUTCHEON & NESBETT,

By /s/ BUELL A. NESBETT.

United States of America,
Territory of Alaska—ss.

Antonio Polimeni, being first duly sworn on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

/s/ ANTONIO POLIMENI.

Subscribed and sworn to this 23rd day of December, 1948, before me.

[Seal] /s/ SHELLE W. BROOKS,
Notary Public in and for
Alaska.

My Commission expires: 2/3/52.

[Exhibit A attached is identical to Plaintiff's Exhibit No. 3 set out at page ——.]

[Endorsed]: Filed February 11, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now Edward D. Coffey, the above-named defendant, and by way of answer to the First Cause of Action of plaintiff's Complaint, admits, denies and alleges as follows:

I.

Defendant has no knowledge or information sufficient to form a belief concerning the allegations of Paragraph I of the First Cause of Action of plaintiff's Complaint, and therefore denies each and all of such allegations.

II.

Defendant admits that at the times mentioned in plaintiff's Complaint, defendant was and now is engaged as an insurance agent and broker in the City of Anchorage, Third Division, Territory of Alaska, and denies the other allegations of Paragraph II of the First Cause of Action of plaintiff's Complaint.

III.

Defendant denies each and all the allegations of Paragraph III of the First Cause of Action of plaintiff's Complaint, except that defendant admits that under date of March 30, 1948, plaintiff requested information of the defendant concerning certain insurance, and that on the 9th day of April, 1948, defendant by letter acknowledged receipt of the inquiry made by plaintiff under date of March 30, 1948, and furnished certain information requested in that inquiry.

IV.

Defendant admits that on or about the 17th day of April, 1948, plaintiff mailed a letter to defendant; that a copy of such letter is attached to plaintiff's Complaint, marked Exhibit "A," but denies each and all the other allegations of Paragraph IV of the First Cause of Action of plaintiff's Complaint.

V.

Defendant admits that he received plaintiff's letter dated April 17, 1948, a copy of which is attached to plaintiff's Complaint as Exhibit "A," in due course of post, and denies each and all the other allegations of Paragraph V of the First Cause of Action of plaintiff's Complaint.

VI.

Defendant admits the allegations of Paragraph VI of the First Cause of Action of plaintiff's Complaint, subject, however, to the conditions, exceptions and exclusions of such policies.

VII.

Defendant has no knowledge or information sufficient to form a belief concerning the allegations of Paragraph VII of the First Cause of Action of Plaintiff's Complaint, and therefore denies each and all of such allegations.

VIII.

Defendant has no knowledge or information sufficient to form a belief concerning the allegations of Paragraph VIII of the First Cause of Action of

plaintiff's Complaint, and for that reason denies each and all of such allegations, except the allegation that defendant promised to furnish plaintiff any insurance, and that allegation is specifically denied. In that connection defendant alleges that plaintiff at no time offered or tendered any insurance premium in any amount to defendant in connection with the policy of insurance plaintiff claims to have ordered from defendant, and alleges that defendant did not at any time promise or agree to furnish any insurance in any amount to the plaintiff in connection with the property of the plaintiff above mentioned.

IX.

Defendant has no knowledge or information sufficient to form a belief concerning the allegations of Paragraph IX of the First Cause of Action of plaintiff's Complaint, and therefore denies each and all of such allegations.

X.

Defendant denies each and all the allegations of Paragraph X of the First Cause of Action of plaintiff's Complaint, and in that connection alleges that if in fact plaintiff has sustained personal loss in the sum of \$10,000.00, or in any other sum, that such loss was not due to any negligence of the defendant, and that defendant is not liable to plaintiff therefor. That if in fact plaintiff suffered any damages, defendant alleges that said resulting damages were not the result of any negligence or carelessness of the defendant, but were the result of carelessness

and negligence of the plaintiff by his failure to act on the information received in the letter of June 4 (Exhibit 5 attached hereto) without the use by plaintiff of due care and circumspection for his own protection.

By way of answer to the Second Cause of Action of plaintiff's Complaint, defendant admits, denies and alleges as follows:

I.

Defendant adopts his answers to Paragraphs I, II, III and IV of the First Cause of Action of plaintiff's Complaint as and for his answer to Paragraph I of the Second Cause of Action of plaintiff's Complaint, to the same extent as though such answers were here re-alleged in full.

II.

Defendant admits that he received plaintiff's letter of April 17, 1948, in due course of post, and denies each and all the other allegations of Paragraph II of plaintiff's Second Cause of Action. In that connection defendant alleges that he never at any time promised to insure plaintiff's property against loss by fire by policies of insurance in the usual form issued by defendant, or otherwise, and defendant alleges that he is not engaged and has never been engaged in issuing insurance policies except insofar as defendant in the course of his business acts as agent for companies authorized to write insurance in the Territory of Alaska.

III.

Defendant has no knowledge or information sufficient to form a belief concerning the allegations of Paragraph III of the Second Cause of Action of plaintiff's Complaint, and therefore denies each and all of such allegations, except that defendant specifically denies that he ever promised to issue a policy of insurance to the plaintiff in connection with the property described in plaintiff's Complaint.

IV.

Defendant admits the allegations of Paragraph IV of the Second Cause of Action of plaintiff's Complaint, subject, however, to the conditions, exceptions and exclusions of the policies in question.

V.

Defendant has no knowledge or information sufficient to form a belief concerning the allegations of Paragraph V of the Second Cause of Action of plaintiff's Complaint, and therefore denies each and all of such allegations.

VI.

Defendant has no knowledge or information sufficient to form a belief concerning the allegations of Paragraph VI of the Second Cause of Action of plaintiff's Complaint, and therefore denies each and all of such allegations.

As a further answer to plaintiff's Complaint, and by way of affirmative defense thereto, defendant alleges as follows:

I.

That the entire negotiation between plaintiff and defendant concerning proposed insurance on property claimed by plaintiff to be owned by him and described in plaintiff's Complaint, was had by correspondence between the parties. That attached hereto and by reference made a part hereof are copies of the entire correspondence between plaintiff and defendant concerning the matter here at issue, as follows:

Exhibit 1, letter dated March 30, 1948, directed to defendant Edward D. Coffey, at Anchorage, Alaska, and signed Antonio Polimeni.

Exhibit 2, letter dated April 9, 1948, addressed to Mr. Antonio Polimeni, South Naknek, Alaska, and signed by Grace McConnell on behalf of defendant.

Exhibit 3, letter dated April 17, 1948, addressed to the defendant Edward D. Coffey, at Anchorage, Alaska, signed by Antonio Polimeni. (This letter is the same as Exhibit "A" attached to plaintiff's Complaint.)

Exhibit 4, letter dated June 1, 1948, addressed to Edward Coffey, Anchorage, Alaska, signed by Antonio Polimeni.

Exhibit 5, letter dated June 4, 1948, addressed to Mr. Antonio Polimeni, at South Naknek, Alaska, signed by Evelyn McCord on behalf of defendant.

Exhibit 6, letter dated July 23, 1948, addressed to Mr. Antonio Polimeni, South Naknek, Alaska, signed by Grace McConnell on behalf of the defendant.

Exhibit 7, letter dated August 2, 1948, addressed to Edward D. Coffey, General Insurance, Anchorage, Alaska, signed by Hal M. Marchbanks, United States Commissioner.

Exhibit 8, telegram dated August 5, 1948, addressed to Hal M. Marchbanks, United States Commissioner, Naknek, Alaska, signed by Edward D. Coffey.

Exhibit 9, letter dated August 5, 1948, addressed to Mr. Antonio Polimeni, South Naknek, Alaska, signed by Grace McConnell on behalf of the defendant.

II.

That as will appear from the correspondence attached hereto as exhibits, and more particularly described in Paragraph I above, there was no meeting of the minds of the parties and no contract resulted between the parties, and if in fact plaintiff owned certain property, as alleged in his Complaint, and if in fact such property was destroyed by fire, defendant has no liability to plaintiff by reason of such destruction.

Wherefore, having fully answered plaintiff's Complaint, defendant prays that plaintiff take nothing thereby, and that defendant have and recover of and from the plaintiff defendant's costs and disbursements in this action incurred, including

a reasonable attorney's fee to be fixed by the Court.

DAVIS & RENFREW,

Attorneys for Defendant,

By /s/ EDWARD V. DAVIS.

United States of America,

Territory of Alaska—ss.

Edward D. Coffey, being first duly sworn, on oath deposes and says:

That he is the defendant above named; that he has read the foregoing Answer, knows the contents thereof, and that the matters and things therein contained are true as he verily believes.

/s/ EDWARD D. COFFEY.

Subscribed and sworn to before me this 26th day of May, 1949.

[Seal] /s/ EDWARD V. DAVIS,

Notary Public for Alaska.

My Commission expires: 11/7/1950.

[Exhibits attached numbered 1 through 9 and are identical to Plaintiff's Exhibits numbered 1 through 9 and are set out at pages 166 to 175, save and except Form Number 7080 which is a part of Exhibit 2 and is set out as Defendant's Exhibit B at page 274.]

Receipt of Copy acknowledged.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes now Edward D. Coffey, the above-named defendant, by and through Davis & Renfrew, his attorneys, and moves that plaintiff may be required to furnish a bill of particulars as follows:

1. That the plaintiff be required to describe with particularity the buildings described in Paragraph I of the First Cause of Action of plaintiff's Complaint.

2. That plaintiff be required to set forth with particularity a full and complete description of the furnishings and equipment contained in such buildings, and to set forth what furnishings and equipment were contained in each of the several buildings.

3. That defendant be required to furnish an inventory of the stocks of merchandise claimed by plaintiff in Paragraph I of his First Cause of Action to have been contained in the buildings therein described, setting forth what merchandise was located in each of such buildings.

4. That plaintiff be required to furnish full and complete particulars as to the fire alleged by plaintiff to have destroyed the property described in Paragraph I of the First Cause of Action of plaintiff's Complaint, setting forth particularly the time of day when the fire occurred, the cause of the fire insofar as plaintiff has been able to determine such cause, the steps, if any, which were taken by the

plaintiff in fighting the fire, what steps, if any, plaintiff took in attempting to salvage the property, and if any property was salvaged, a full and complete description of such property.

Dated at Anchorage, Alaska, this 26th day of May, 1949.

DAVIS & RENFREW,
Attorneys for Defendant,

By /s/ EDWARD V. DAVIS.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 27, 1949.

[Title of District Court and Cause.]

REPLY

The plaintiff replies to defendant's affirmative defense and says:

I.

Admits that Exhibits 1 through 9 represent correspondence between plaintiff and defendant, but for lack of information, sufficient to form a belief, denies that said exhibits constitute the entire correspondence between plaintiff and defendant as alleged in Paragraph I.

II.

Denies all of the allegations contained in para-

graph II that are inconsistent with the allegations contained in plaintiff's causes of action.

McCUTCHEON & NESBETT,
Attorneys for Plaintiff,

By /s/ BUELL A. NESBETT.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 11, 1949.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant Edward D. Coffey requests plaintiff, Antonio Polimeni, within ten (10) days after service of this request upon plaintiff's attorneys, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial.

1. That Exhibits numbered one through nine, both numbers inclusive, attached to defendant's answer filed in the above-entitled matter, and copies of which are hereto attached represent all of the correspondence between plaintiff and defendant in connection with the proposal to secure insurance policy which is the subject of plaintiff's action.

2. That all negotiations had between plaintiff and defendant in connection with the proposed in-

insurance policy which is the subject of this action were had by correspondence between the parties, represented by Exhibits numbered one through nine set forth in the preceding statement. That plaintiff, Antonio Polimeni, at all times realized that Edward D. Coffey is what is known as an insurance broker, and that such person did not write insurance policies.

3. That plaintiff knew that no insurance policy was in effect covering his property at Naknek, Alaska, at the time of the fire which destroyed such property.

4. That no report of plaintiff's loss was made to the defendant Edward D. Coffey prior to the letter dated August 2, 1948, addressed to Edward D. Coffey at Anchorage, Alaska, and signed by Hal M. Marchbanks, United States Commissioner.

5. That plaintiff has not at any time furnished or attempted to furnish to defendant any proofs of loss or any statement concerning the alleged loss which might go to show that the fire which occasioned plaintiff's loss was within the terms of any insurance policy, had one been issued.

Dated at Anchorage, Alaska, this 22nd day of March, 1950.

DAVIS & RENFREW,
Box 477, Anchorage, Alaska, Attorneys for the Defendant.

By /s/ EDWARD V. DAVIS.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 22, 1950.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSION

Plaintiff responds to defendant's request for admissions and says:

I.

Denies the allegations contained in paragraph I of defendant's request.

II.

Denies the allegations contained in paragraph II of defendant's request.

III.

Denies the allegations of paragraph III of defendant's request.

IV.

Plaintiff is not certain whether a report of his loss was made to the defendant prior to the letter of August 2, 1948, and therefore denies the allegations contained in paragraph IV of defendant's request.

V.

Denies the allegations contained in paragraph V of the defendant's request.

Dated at Anchorage, Alaska, this 28th day of March, 1950.

McCUTCHEON & NESBETT,
Attorneys for Plaintiff,

By /s/ BUELL A. NESBETT.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed, March 29, 1950.

[Title of District Court and Cause.]

The following is a true bill of particulars of those matters upon which you made demand for a Bill of Particulars.

McCUTCHEON & NESBETT,
Attorneys for Plaintiff.

By /s/ BUELL A. NESBETT.

BILL OF PARTICULARS

1. Plaintiff is unable to describe the said buildings with more particularity than is done in paragraphs 1, 2 and 3 of Exhibit “A” of plaintiff’s complaint, also Exhibit 3 of defendant’s answer.

2. The following is a list of furnishings contained in the buildings and an approximate inventory of supplies and merchandise located in the buildings:

Main Building

6 Tables approx. 22 x 34" @ 12.00	\$ 72.00
1 Dining table 4' x 8'	45.00
1 China closet	120.00
2 Dressers with mirrors @ 80.00	160.00
12 Chairs @ 5.00	60.00
1 Double bed, spring and mattress	80.00
4 ¾ size beds, springs and mattresses	400.00
1 Cot with spring and mattress	50.00
1 Lot of blankets, sheets, pillows and cases	50.00
1 Cook stove oil burner type	400.00
1 Hot water tank 80 gals. galv. iron	39.00
1 Automatic electric water pump and piping to well.....	226.00
1 Light plant Wisconsin motor D.C. generator	350.00
1 Lot pots and pans aluminum	150.00
1 Lot crockery dishes	300.00
1 Lot beer and wine glasses for the bar	80.00
Personal clothing and gear	500.00
Cash and currency buried in basement	2,000.00
Sub total	<u>\$5,082.00</u>

1 Lot of canned food as listed	\$3,047.24
6 Cases bottled beer @ 7.00	42.00
3 Cases sherry wine	75.00
2 Cases claret wine	50.00
3 Cases port wine	72.00

Totals	\$8,368.24
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Provisions List

Item	Amount	Cost	Total
Potatoes	10 sacks	\$11.00	\$110.00
Milk	25 cases	6.96	174.00
Peas	12 doz.	2.64	31.68
Corn	16 doz.	2.76	44.16
Carrots	12 doz.	3.00	36.00
Spinach	6 doz.	3.24	19.44
Sauerkraut	6 doz.	2.88	17.28
Peaches	12 doz.	4.80	57.60
Apricots	8 doz.	4.80	38.40
Pears	14 doz.	6.48	90.72
Cherries	6 doz.	5.04	30.24
Figs	4 doz.	5.40	21.60
Pineapple	8 doz.	5.04	40.32
Blackberries	2 doz.	4.68	9.36
Boysenberries	1 doz.	4.20	4.20
Raspberries	1 doz.	5.52	5.52
Spam	4 doz.	6.60	26.40
Beef and Gravy	6 doz.	5.52	38.12
Cod Fish	10 doz.	2.16	21.60
Oysters	4 doz.	6.60	26.40
Clams	2 doz.	5.88	11.76
Ham, canned 59# cans.....	8 cases	1.10 lb.	519.20
Corned Beef	24 doz.	4.92	118.08
Sardines	4 doz.	1.68	6.72
Wieners	12 doz.	7.20	86.40
Bacon, canned 24# cans.....	2 cases	.84 lb.	40.32
Bacon, slab	112 lbs.	.75	84.00
Flour, white	800 lbs.	9.50/100	76.00
Eggs	120 doz.	.80	96.00
Butter	150 lbs.	.90	135.00
Tomatoes	12 doz.	3.72	44.64
Onions	2 sacks	14.50	29.00
Macaroni	200 lbs.	.20	40.00
Spaghetti	400 lbs.	.20	80.00
Rice	1 sack	19.00	19.00
Beans	16 doz.	3.60	57.60
Beans, dry	1 sack	16.00	16.00
Beans, white	1 sack	16.00	16.00
Peas, split	75 lbs.	.14	10.50
Beans, lima	50 lbs.	.18	9.00

Item	Amount	Cost	Total
Prunes, dry	50 lbs.	.28	16.80
Apples, dried	50 lbs.	6.50/25#	13.00
Peaches, dried	50 lbs.	.30	15.00
Apricots, dry	40 lbs.	.48	15.20
Raisins, dry	25 lbs.	.24	6.00
Pears	50 lbs.	.40	20.00
Sugar	4 sacks	11.50	46.00
Salt, table	2 cases	3.12	6.24
Sugar, cube	48 lbs.	.17	8.16
Apple Jelly	2 doz.	3.24	6.48
Syrup	2 cases	5.40	10.80
Preserves, asst.	8 doz.	4.20	33.60
Catsup	4 doz.	2.88	11.52
A-1 Sauce	1 case	4.40	4.40
Mustard	3 cases	1.50	1.50
Salt Beef	400 lbs.	.73	292.00
Pigs Feet	200 lbs.	.47	94.00
Coffee	144 lbs.	.62	89.28
Tea	12 lbs.	1.40	16.80
Lard	18 lbs.	.40	7.20
Total.....			\$3,047.24

3. The fire occurred at approximately 1:00 a.m., July 20, 1948, cause being unknown. The building was unoccupied at time of fire insofar as plaintiff is aware; plaintiff was absent from Naknek and engaged in fishing at the time. Plaintiff is informed that no steps were taken to extinguish the fire for the reason that after discovery the heat was too intense to permit a close approach. Nothing was salvaged from the fire.

McCUTCHEON & NESBETT,
Attorneys for Plaintiff.

By /s/ BUELL A. NESBETT.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 5, 1950.

[Title of District Court and Cause.]

MINUTES OF APRIL 17, 1950

Trial by Jury

Now on this 17th day of April, 1950, came the plaintiff and with Buell A. Nesbett and Stanley J. McCutcheon, of counsel and came also defendant with William W. Renfrew, of his counsel and both sides announcing themselves as ready for trial in Cause No. A-5366, entitled Antonio Polimeni, plaintiff versus Edward D. Coffey, defendant, the following proceedings were had, to wit:

The Deputy Clerk, under the direction of the Court, proceeded to draw from the Trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors, so drawn.

At 11:05 o'clock a.m. Court duly admonished Jurors in Box and continued cause until 11:10 o'clock a.m.

Now came the Jurors in Box, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, defendant, was resumed.

Whereupon the Deputy Clerk, under the direction of the Court, continued to draw from the Trial Jury Box, one at a time, the names of the members of the

regular panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors, so drawn, until both sides were satisfied and the Jury complete, consisting of the following named persons, to wit:

1. Ralph G. Carlson
2. Alice T. Stingle
3. Lorena H. Trudeau
4. Mrs. G. A. Benedict
5. Mary McDanell
6. Tom Kovac
7. Mrs. Lorene Gray
8. Andrew Longmire
9. Jean Wright
10. Ester Lounsbury
11. Fred S. Wilmans
12. Bertha Meier

which said Jury was duly sworn by the Deputy Clerk to well and truly try the matters at issue in the above-entitled cause and a true verdict render in accordance with the evidence and the instructions given by the Court.

At this time the Court excused the members of the regular panel of Petit Jurors, not engaged in the trial of this cause, to report at 10:00 o'clock a.m. of Wednesday, April 19, 1950.

At 11:40 o'clock a.m. Court duly admonished trial Jury and continued cause until 2:00 o'clock p.m.

Now came the Trial Jury, who on being called,

answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, plaintiff' versus Edward D. Coffey, defendant, was resumed.

Opening statement to the Jury was had by Buell A. Nesbett, for and in behalf of the plaintiff.

At this time Buell A. Nesbett, counsel for plaintiff, moves Court for leave to amend complaint by interlineation as follows:

In paragraph 7, 1st cause action; and in paragraph 5, 2nd cause of action by substituting date 7-20-48 for 7-9-48; Motion Granted.

Opening statement to the Jury was waived by William W. Renfrew, for and in behalf of the defendant.

William De Ville Smith, being first duly sworn, testified for and in behalf of the plaintiff.

At 3:30 o'clock p.m. Court duly admonished Trial Jury and continued cause until 3:40 o'clock p.m.

Now came the Trial Jury, who on being called, answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, plaintiff, versus Edward D. Coffey, defendant, was resumed.

Kenneth F. Shipley, being first duly sworn, testified for and in behalf of the plaintiff.

Albert Henry Ruhl, being first duly sworn, testified for and in behalf of the plaintiff.

Edward D. Coffey, being first duly sworn, testified for and in behalf of the plaintiff.

At 5:00 o'clock p.m. Court duly admonished Trial Jury and continued cause until 10:00 o'clock a.m. of Tuesday, April 18, 1950.

Entered Journal Apr. 17, 1950.

[Title of District Court and Cause.]

SUBPOENA

The President of the United States of America,
Greeting:

To Joseph Sheahan.

You Are Hereby Required, That all and singular business and excuses being set aside, you appear and attend before the District Court, Territory of Alaska, Third Division, to be held in the Court Room of said court at Anchorage, in the Territory of Alaska, on the 18th day of April, A.D. 1950, at 10 o'clock a.m., then and there to testify in the above-entitled cause, now pending in said Court, on the part of the Plaintiff, and you are not to depart the Court without leave of the Court.

And for failure to attend, as above required, you will be deemed guilty of contempt of Court, and liable to pay the party aggrieved all loss and damage sustained thereby.

Witness, the Honorable Anthony J. Dimond,
Judge of the said District Court, Territory of

Alaska, Third Division, and the seal of the said Court affixed this 17th day of April, in the year of our Lord one thousand nine hundred and fifty and of the Independence of the United States the one hundred and seventy-fourth.

M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division.

[Seal] By /s/ LOUISE STRAHUEN,
Deputy Clerk.

Marshal's return attached.

[Title of District Court and Cause.]

MINUTES OF APRIL 18, 1950

Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

Edward D. Coffey, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

Joseph Sheahan, being first duly sworn, testified for and in behalf of the plaintiff.

Letter, dated 3/30/48, to Edward D. Coffey by

Antonio Polimeni, was duly offered, marked and admitted as plaintiff's exhibit No. 1.

Copy of letter, dated 4/9/48, to Mr. Antonio Polimeni by Edward D. Coffey, was duly offered, marked and admitted as plaintiff's exhibit No. 2.

Letter, dated 4/17/48 to Edward D. Coffey by Antonio Polimeni was duly offered, marked and admitted as plaintiff's exhibit No. 3.

Letter, dated 6/1/48 to Ed. Coffey, by Antonio Polimeni, was duly offered, marked and admitted as plaintiff's exhibit No. 4.

Copy of letter, dated 6/4/48 to Mr. Antonio Polimeni by Edward D. Coffey, was duly offered, marked and admitted as plaintiff's exhibit No. 5.

Letter, dated 7/23/48 to Mr. Antonio Polimeni by Edward D. Coffey, was duly offered, marked and admitted as plaintiff's exhibit No. 6.

Letter, dated 8/2/48 to Mr. Edward D. Coffey by Hal M. Marchbanks was duly offered, marked and admitted as plaintiff's exhibit No. 7.

Copy of telegram, dated 8/5/48, to Hal M. Marchbanks by Edward D. Coffey was duly offered, marked and admitted as plaintiff's exhibit No. 8.

Copy of letter, dated 8/5/48 to Mr. Antonio Polimeni by Edward D. Coffey, was duly offered, marked and admitted as plaintiff's exhibit No. 9.

At 11:15 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 11:20 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respec-

tive parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

Joseph Sheahan, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

At 11:50 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

Joseph Sheahan, heretofore duly sworn, resumed the witness stand for further cross-examination for and in behalf of the defendant.

At 3:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

At this time Buell A. Nesbett, for and in behalf of the plaintiff, moves the Court for leave to amend complaint by interlineation to conform with the proof, in Paragraph 7, line 2, first cause of action.

by adding words "except the two auxiliary buildings"; same amendment in paragraph 5, second cause of action; motion allowed.

Antonio Polimeni, being first duly sworn, testified for and in his own behalf.

The plaintiff rests.

At this time William W. Renfrew, of counsel for defendant, moves the Court that jury be excused pending argument on point of law; jury duly admonished and excused to report at 10:00 o'clock a.m. of Wednesday, April 19, 1950.

Reporting waived.

At this time William W. Renfrew, of counsel for defendant, moves the court for judgment in behalf of the defendant.

Argument to the Court was had by William W. Renfrew, for and in behalf of the defendant.

At 4:55 o'clock p.m. Court continued cause to 10:00 o'clock a.m. of Wednesday, April 19, 1950.

Entered Apr. 18, 1950.

[Title of District Court and Cause.]

MINUTES OF APRIL 19, 1950

Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled

Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

At this time trial jury excused to 2:00 o'clock p.m. this date, pending arguments on point of law.

Argument to the Court was had by Buell A. Nesbett for and in behalf of the plaintiff.

At 11:15 o'clock a.m. Court continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

At this time the Trial Jury was excused pending arguments on point of law.

Argument to the Court was resumed by Buell A. Nesbett, for and in behalf of the plaintiff. Court rules no contract and grants plaintiff to 10:00 o'clock a.m. of Thursday, April 20, 1950, to amend complaint if so desired.

At 2:35 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Thursday, April 20, 1950.

Entered Apr. 19, 1950.

MINUTES OF APRIL 20, 1950

Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antoni Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

At this time William Renfrew, in behalf of the defendant, renewed motion for dismissal.

Trial Jury was excused pending argument on points of law.

Argument to the Court was had by Edward V. Davis, for and in behalf of the Defendant.

Argument to the Court was by Buell A. Nesbett, for and in behalf of the plaintiff.

Argument to the Court was by Edward V. Davis, for and in behalf of the Defendant.

Argument to the Court was had by William Renfrew, for and in behalf of the Defendant.

Argument to the Court was had by Buell A. Nesbett, for and in behalf of the plaintiff.

Whereupon the Court having heard the arguments of the respective counsel and being fully and duly advised in the premises, denied motion.

At 11:00 o'clock a. m. Court duly admonished Trial Jury and continued cause until 11:05 o'clock a.m.

Now came the Trial Jury, who on being called,

each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antoni Polimeni, Plaintiff, versus Edward D. Coffey, Defendants, was resumed.

Grace McConnell, being first duly sworn, testified for and in behalf of the defendant.

A letter, 1-23-48, to Edward D. Coffey, Agency by Cravens, Dargan and Co. was duly offered marked and admitted as Defendants exhibit "A."

At 11:50 o'clock a.m. Court duly admonished Trial Jury and continued cause until 2:00 o'clock p. m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendants, was resumed.

At this time Buell E. Nesbett, in behalf of the plaintiff, moves Court that jury be excused pending arguments on points of law; Motion Granted.

Argument to the Court was had by Buell E. Nesbett, for and in behalf of the plaintiff.

Jury recalled.

Grace McConnell, heretofore duly sworn, resumed witness stand for further testimony for and in behalf of the defendant.

Form 78, standard Forms Bureau form, was duly offered, marked and admitted as Defendants exhibit "B."

At 3:05 o'clock p.m. Court duly admonished Trial Jury and continued cause until 3:10 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

Grace McConnell being heretofore duly sworn, resumed witness stand for further cross-examination for and in behalf of the plaintiff.

Antonio Polimeni, heretofore duly sworn, resumed witness stand for further cross-examination for and in behalf of the defendant.

Daniel H. Cuddy, being first duly sworn, testified for and in behalf of the defendant.

Defendant Rests.

At 3:35 o'clock p.m. Court duly admonished Trial Jury and continued cause until 3:40 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5466, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

William de Ville Smith, heretofore duly sworn resumed witness stand for further testimony for and in behalf of the plaintiff.

Plaintiff Rests.

Defendant Rests.

William Renfrew, in behalf of the defendant, renews motion for dismissal; Motion Denied.

At 4:00 o'clock p.m. Court duly admonished Trial Jury and continued cause until 10:00 o'clock of Friday April 21, 1950.

[Title of District Court and Cause.]

MINUTES OF APRIL 21, 1950

Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

Opening argument to the jury was had by Buell A. Nesbett, for and in behalf of the plaintiff.

Argument to the Jury was had by William W. Renfrew, for and in behalf of the defendant.

At 11:25 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 11:30 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

Closing argument to the Jury was had by Buell A. Nesbett, for and in behalf of the defendant.

At 11:45 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, was resumed.

Argument to the Jury was resumed by Buell A. Nesbett, for and in behalf of the plaintiff.

At this time by leave of the Court, William W. Renfrew, of counsel for defendant, amends the answer filed by the defendant by substituting page 2 of the original answer with the amendment on contributory negligence, also numbered page 2.

At this time the Court read his instructions to the Jury and Don Carlquist and John Mack were duly sworn by the Deputy Clerk of the Court as bailiffs in charge of said Jurors and at 3:20 o'clock p.m. Jury retired in charge of their sworn bailiffs to deliberate upon their verdict.

Entered April 21, 1950.

[Title of District Court and Cause.]

REQUESTED INSTRUCTIONS ON
BEHALF OF DEFENDANT

1.

You are instructed that the burden is upon the plaintiff in this case to establish his right to recovery against the defendant by a fair preponderance of the evidence in all the elements material to his right to recover as hereinafter set forth.

The elements which plaintiff must prove, as above set forth, are as follows:

(1) That defendant Edward D. Coffey owed a duty to plaintiff to secure insurance for plaintiff;

(2) That defendant Edward D. Coffey, through negligence or want of due care, failed to procure insurance for the plaintiff or to notify the plaintiff that he did not intend to attempt to procure such insurance;

(3) That except for the failure of defendant Coffey to act on plaintiff's letter, insurance would have been issued covering the property which Mr. Polimeni, the plaintiff, desired insured;

(4) That Mr. Polimeni had an insurable interest in the property;

(5) That the fire which burned the property concerning which Mr. Polimeni has made claim, would have come within the provisions of the policy of insurance, if such policy had been issued;

(6) That the property Mr. Polimeni claims to have been lost was of a kind which would have been covered by insurance had insurance been procured;

(7) That plaintiff suffered damage by reason of the loss and that such damage would have been covered by insurance had a policy been secured; and

(8) The amount of the damage resulting from the fire with particularity and without speculation;

Unless each and all of these elements have been proved to your satisfaction by a fair preponderance of the evidence, your verdict must be for the defendant.

2.

You are instructed that the burden of proof is upon the plaintiff in this case not only to show the amount of any damage or loss for which he sues, and that such damage or loss was sustained as a result of the alleged fire, but also to show that such damage or loss would have been covered by an insurance policy had such policy been procured for the plaintiff by the defendant, according to plaintiff's letter.

3.

You are instructed that unless plaintiff has proved to your satisfaction, by a fair preponderance of the evidence, that he was the sole and undisputed owner of the property concerned in this action, then plaintiff is not entitled to recover anything by reason of the loss of such property, and in that event your verdict should be for the defendant.

4.

You are instructed that in this case, as in all other cases, plaintiff was required to use due care for the protection of his own property, irrespective of any want of care or negligence on behalf of the defendant. Accordingly, if you should find from the evidence that the plaintiff, Mr. Polimeni, could have, in the exercise of due care on his part, secured insurance either through Mr. Coffey or from some other source, after he knew or should have known by the exercise of due care that Mr. Coffey had not procured an insurance policy on his behalf, then plaintiff is not entitled to recover against the defendant, even though you should find that the defendant owed a duty to the plaintiff and did not use due care in attempting to perform that duty.

5.

You are instructed that if you believe that Mr. Polimeni, in his letter, made a misstatement of fact as to the location of the electric light plant, and if you further find that the electric light plant in its actual location would tend to increase the risk involved from the standpoint of insurance written on the property, then you are instructed that regardless of any duty of the defendant to the plaintiff and regardless of any negligence or lack of care by the defendant, your verdict must be for the defendant.

6.

You are instructed that you should not consider the value of any money or currency buried in the

basement, or hidden elsewhere on the premises, in determining any damages that plaintiff may have suffered, for the reason that it stands undisputed that such money would not have been insured even though an insurance policy had been procured.

[Endorsed]: Filed April 21, 1950.

PLAINTIFF'S REQUESTED INSTRUCTIONS

No. 1

Where an insurance broker or agent undertakes to procure insurance for another, he is bound to exercise reasonable diligence to obtain same and to give timely notice to his principal in the event he is unable to procure the insurance requested by his principal, and any loss resulting to his principal by reason of the inattention, neglect or incapacity of the broker or agent makes the broker or agent personally liable to his principal.

Rezac vs. Zima—Kansas

153 Pac 500

Harrod vs. Latham—Kansas

95 Pac 11

Manny vs. Dunlap—C.C., Iowa

Fed. Cases 9,047

Wallace vs. Hartford Fire Ins. Co.—

174 Pac 1009

No. 2

In this case the plaintiff contends that the de-

defendant was negligent in losing or misplacing the plaintiff's letter dated April 17, 1948 (Plaintiff's Exhibit #3), until July 23, 1948, which admittedly was received by defendant on April 24, 1948, and that by reason of the said negligence defendant failed to accomplish insurance coverage of plaintiff's property before it was destroyed by fire on July 20, 1948.

If you believe that the defendant was negligent in failing to cover plaintiff's property by insurance before it was destroyed by fire, or in giving plaintiff timely notice of his, the defendant's, inability to effect such insurance coverage, you will bring in a verdict for the plaintiff.

If you believe the defendant was not etc., etc.

Manny vs. Dunlap—C.C., Iowa

Fed Cases 9,047

Morris vs. Summerl—C.C., Penn.

Fed. Cases 9,837

and other authorities cited.

No. 3

You are instructed that if you find the defendant guilty of negligence in failing to attempt to procure insurance for the plaintiff, the measure of damages is the amount of insurance that would have been procured had the defendant acted with reasonable diligence, in this case the sum of \$10,000.00, less the amount of the premium that would have been paid to the defendant, in this case the sum of \$300.00, less what you consider to be the reasonable value of

the two auxiliary buildings which were not destroyed by fire.

Receipt of copy acknowledged.

[Endorsed]: Filed April 21, 1950.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

When you were accepted as jurors in this case you obligated yourselves by your oaths to well and truly try the matter in issue between the plaintiff and the defendant, and a true verdict render according to the law and the evidence as given to you on the trial. That oath means that you will not be swayed by passion, sympathy or prejudice, and that your verdict will be the result of a careful consideration of all the evidence and the instructions of the Court as to the law.

Neither the statements of counsel engaged in the trial of this case, nor the allegations of the pleadings, except so far as they constitute admissions, are to be considered by you as proof of the facts to which they relate. You should not regard or con-

sider the relative financial condition of the parties to the suit, nor the effect of your verdict upon the parties, or any of them, or attempt to arrive at a verdict based upon your individual or collective opinions as to the abstract principles of justice which should govern the case.

It is not for you to say what the law is or should be regardless of any idea you may have in that respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

No. 2

By this action plaintiff seeks to recover damages in the sum of \$10,000 from defendant for alleged negligent delay in procuring insurance against fire on property consisting of 3 buildings at Naknek and contents which plaintiff alleges belonged to him and were of the value of \$10,000.

The complaint alleges that at all times material to this action the defendant was engaged as agent in the insurance business; that on March 30, 1948, plaintiff inquired of defendant regarding insurance on the property aforesaid; that the defendant re-

plied, requesting certain information and that on April 17th, plaintiff supplied the requested information, but that the defendant negligently mislaid said letter and failed to procure the insurance applied for and that on July 20th the property with the exception of two auxiliary buildings was totally destroyed by fire, in consequence of which plaintiff alleges he was damaged in the sum of \$10,000, less the value of the buildings referred to.

By his answer, the defendant denies that there was any negligence on his part and denies plaintiff's ownership of the property, thus placing upon the plaintiff the burden of proving the foregoing allegations of the complaint by a preponderance of the evidence. Unless the plaintiff sustains this burden, he cannot recover. The defendant also alleges that the plaintiff was guilty of contributory negligence by failing to act on plaintiff's exhibit No. 5. The burden of proving contributory negligence on the part of the plaintiff by a preponderance of the evidence is on the defendant.

No. 3

The questions for your determination are:

(1) Whether the defendant was negligent in not acting on plaintiff's application within a reasonable time.

(2) Whether, but for such negligence, if any, plaintiff would have received the insurance applied for.

(3) The value and ownership of the property destroyed, except money, for which insurance was applied for in the letter of April 17, 1948, plaintiff's exhibit No. 3.

(4) Whether the defendant's negligence, if any, was the proximate cause of the alleged loss; and, if so, whether the plaintiff was guilty of contributory negligence.

No. 4

You are instructed that if you find that upon the receipt of plaintiff's application for insurance, as a result of previous correspondence and relations between the parties, there arose a duty on the part of the defendant to act promptly on the application, with a view to procuring insurance without unreasonable delay, or in case of rejection or insufficiency of the application, to promptly notify the plaintiff thereof, then for a negligent failure to do so, defendant would be liable to plaintiff for any loss proximately caused thereby, unless you find that the plaintiff was guilty of contributory negligence.

No. 5

Negligence, as used in the law applicable to this case, is the failure to exercise due care—that is, such care as an ordinarily prudent person would exercise under like circumstances. It is the doing of something which a person of ordinary prudence and that a person of ordinary prudence and care would care would not have done under like or similar circumstances, or it may be the failure to do something

not have omitted to do under similar circumstances. What constitutes negligence in any particular case depends upon the facts and circumstances.

It is for you to say whether the defendant was negligent in the respect alleged, or whether the delay, if any, was unreasonable.

No. 6

By proximate cause is meant the probable and direct cause. It is the cause which directly produces the damage and without which the damage would not have occurred. Unless, therefore, the negligence, if any, of the defendant was the proximate cause of the damage, the defendant would not be liable under the theory of negligence.

An act of negligence is the proximate cause where the damage is the ordinary, natural and probable result of the negligence and where the damage would not have occurred except for such negligence.

No. 7

If, therefore, you find from a preponderance of the evidence that the plaintiff in response to defendant's letter of April 9, 1948, applied for insurance in the amount of \$10,000 on the property referred to, but that the defendant neglected to act upon such application within a reasonable time and that in the meantime plaintiff's property was destroyed by fire, and further find that, but for such negligence, if any, the plaintiff would have received the insurance applied for and would not have sustained the loss alleged, you should find for the plaintiff in such

sum as you find as he has been damaged, not exceeding the amount sued for after deducting the value of the two buildings not destroyed, and the amount of the premium.

On the other hand, if you do not so find or if you find that the plaintiff was guilty of contributory negligence, or believe that the evidence is evenly balanced, you should find for the defendant.

No. 8

Contributory negligence is negligence on the part of the one suing for damages which, cooperating in some degree with the negligence of another, contributes to the injury or loss for which damages are sought. One who is guilty of contributory negligence may not recover from another for the loss sustained. Therefore, if you find from a preponderance of the evidence that the defendant was guilty of negligence in the respect alleged but further find that the plaintiff was likewise negligent in the respect charged in the answer and that such neglect combined and concurred with the negligence of the defendant in proximately causing the loss, you should find for the defendant.

No. 9

The measure of damages is the amount the plaintiff would have been entitled to recover had the policy applied for been issued—in other words, the replacement value of the building and fixtures, and the reasonable market value of the personal property, not exceeding in the aggregate the sum of \$10,000, less the value of the two buildings not destroyed, and the cost of the premium.

No. 10

You are instructed that you should not consider the value of any money or currency buried in the basement, or hidden elsewhere on the premises, in determining any damages that plaintiff may have suffered, for the reason that it stands undisputed that such money would not have been insured even though an insurance policy had been procured.

No. 11

By reasonable market value is meant that sum of money that an owner desirous of selling but not compelled to do so can secure in cash within a reasonable time in the open market from a person who is desirous of buying but under no compulsion to do so.

No. 12

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue,

you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

No. 13

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the twelve amounts so set down, and then dividing the total by twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

No. 14

Subject to the law as contained in these instructions, you are also the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence, except such evidence as is declared by the Court to be conclusive.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to pro-

duce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony. In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you would decide whether to believe something told you out of court. You size up the witness in court the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the truth, the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, and the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on the witness' credibility and the weight of his testimony. When a witness has a strong personal interest in the outcome of a case, the temptation to lie, or to color, distort or withhold the truth may likewise be strong. Notwithstanding that, however, you may find that he has told the truth. What has just been said concerning interest in the outcome of a case is likewise applicable to bias or prejudice

against or a disposition to favor, either party. In other words, you should bring to bear upon your consideration of the evidence or lack of evidence in this case your common knowledge and experience in life. Accordingly, you should draw from the evidence in this case all deductions which appear to you to flow logically from such evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case. A witness wilfully false in one part of his testimony may be distrusted in other parts. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

No. 15

Under the law each party to a civil action—that is, the plaintiff and the defendant—is a competent witness in his own behalf or in behalf of the other party. In determining the credibility and the weight and value of the testimony, you should take into consideration the fact that they are interested and give their testimony in connection with all the other evidence in the case such weight as you believe it entitled to.

No. 16

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction, founded upon the law and the evidence of the case, merely to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

No. 17

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single

instruction, and you should not single out one particular instruction and consider it by itself or separately from or to the exclusion of all the other instructions.

As you have been heretofore instructed, your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

No. 18

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room the exhibits, the bill of particulars and these instructions, together with two forms of verdict, which are self-explanatory.

If you agree upon a verdict during business hours, that is, between 9 a.m. and 5 p.m., you may have your foreman date and sign it and then return it into open court in the presence of the entire jury, together with these instruction, the exhibits, the bill of particulars, and the unused form of verdict. If, however, you agree upon a verdict after business

hours, that is, after 5 p.m. one day and before 9 a.m. the following day, you should similarly have your foreman date and sign it and seal it in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10 a.m. when the verdict will be received from you in the usual way.

Given at Anchorage, Alaska, this 21st day of April, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed April 21, 1950.

[Title of District Court and Cause.]

VERDICT

Trial by Jury Continued

Now at 10:00 o'clock a.m. came the Jury, in charge of their sworn bailiffs, who, on being called, each answered to his or her name, came also the respective parties, with their respective counsel and said Jury did present by and through their Foreman, in open Court, their verdict in cause No. A-5366, entitled Antonio Polimeni, Plaintiff, vs. Edward D. Coffey, defendant, which is in words and figures as follows, to wit:

which verdict the Court ordered filed and discharged the Jury to report at 2:00 o'clock p.m. of this date.

In the District Court for the Territory of Alaska,
Division Number Three, at Anchorage
No. A-5366

ANTONIO POLIMENI,

Plaintiff,

vs.

EDWARD D. COFFEY,

Defendant.

EXHIBIT No. I

We, the jury, duly impanelled and sworn to try
the above-entitled cause, find for the plaintiff and
assess his damages in the sum of \$9200.00.

Dated at Anchorage, Alaska, this 21st day of
April, 1950.

/s/ FRED S. WILMANS,
Foreman.

Entered Apr. 24, 1950.

[Endorsed]: Filed April 24, 1950.

In the District Court for the Territory of Alaska,
 Division Number Three, at Anchorage
 No. A-5366

ANTONIO POLIMENI,

Plaintiff,

vs.

EDWARD D. COFFEY,

Defendant.

EXHIBIT No. II

We, the jury, duly impanelled and sworn to try
 the above-entitled cause, find for the defendant.

Dated at Anchorage, Alaska, this day of
 April, 1950.

.....

Foreman.

[Endorsed]: Filed April 24, 1950.

In the District Court for the Territory of Alaska,
Third Division

No. A-5366

ANTONIO POLIMENI,

Plaintiff,

vs.

EDWARD D. COFFEY,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial commencing on the 17th day of April, 1950, and concluding on the 21st day of April, 1950, before the above-entitled court at Anchorage, Alaska, the Honorable George W. Folta, sitting as Judge, the plaintiff being represented by McCutcheon and Nesbett, his attorneys, and the plaintiff, Antonio Polimeni, being present in person, and the defendant being present in court and represented by Renfrew and Davis, his attorneys, a jury of twelve persons was regularly impaneled and sworn to try the cause and testimony both oral and documentary having been introduced and submitted on behalf of the plaintiff and defendant, whereupon the court instructed the jury upon the law in the matter, and counsel for both sides having argued the matter to the jury, and the jury having retired to consider their verdict, the jury was directed to bring in a sealed verdict. Thereupon, and at ten o'clock a.m. on the 24th day of April, 1950, the jury returned

into court and returned their sealed verdict, which upon being unsealed in open court and in the presence of the jury was found to be a verdict in favor of the plaintiff reading as follows: Exhibit No. 1. "We, the jury, duly impaneled and sworn to try the above-entitled cause, find for the plaintiff and assess his damages in the sum of \$9,200.00. Dated at Anchorage, Alaska, this 21st day of April, 1950. Fred S. Wilmans, Foreman."

Wherefore by virtue of the law and by reason of the premises aforesaid, it is hereby

Ordered, Adjudged and Decreed, that judgment be and is hereby given in favor of the plaintiff, Antonio Polimeni, in the sum of \$9,200.00, plus interest in the sum of \$., and that the plaintiff shall have and recover of and from the defendant the plaintiff's costs and disbursements in this action incurred to be taxed by the Clerk of the Court in the manner provided by law, and an attorneys fee in the sum of \$750.

Dated at Anchorage, Alaska, this 27th day of April, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

Entered April 27, 1950.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 27, 1950.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND
JUDGMENT AND FOR JUDGMENT IN
FAVOR OF THE DEFENDANT

Comes now Edward D. Coffey, the above-named defendant, and moves that the verdict rendered by the jury in the above-entitled cause against the defendant in the amount of \$9,200.00, rendered on the 27th day of April, 1950, may be set aside, and that judgment entered in favor of the plaintiff and against the defendant following such verdict, may be vacated, and that judgment may be entered in favor of the defendant in accordance with the motion of such defendant for directed verdict made at the close of plaintiff's case and at the close of all of the evidence. In the alternative, defendant moves for a new trial, all as will more fully appear from the motion for new trial to be filed in this cause.

This motion is based upon the fact that as will more fully appear from all the records and files of this action, that the defendant, Edward D. Coffey, at the close of plaintiff's evidence, and again at the close of all of the evidence, moved for the direction of a verdict in his favor on the ground that the evidence was insufficient to justify judgment in favor of the plaintiff and against the defendant, and in particular, the fact that there is no evidence of any duty owned by the defendant Coffey to the plaintiff Polimeni, thus precluding any question of tort liability for negligence.

Dated at Anchorage, Alaska, this 1st day of May, 1950.

DAVIS & RENFREW,

By /s/ WILLIAM W. RENFREW,
Attorneys for the Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 1, 1950.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now Edward D. Coffey, the above-named defendant, by and through his attorneys, and moves that the verdict rendered in the above-entitled cause on the 27th day of April, 1950, in favor of the plaintiff and against the defendant, in the amount of \$9,200.00, may be vacated, and that a new trial may be granted in such action for the following reasons:

1. That the verdict as rendered by the jury is not supported by sufficient evidence, but is contrary to the evidence.
2. That the verdict against the defendant as given is against the law.
3. That the verdict as rendered is for excessive damages, appearing to have been given under the influence of sympathy or prejudice or passion, and

is far in excess of any amount to which the plaintiff might be entitled under the evidence of the cause.

4. That certain errors of law occurred at the trial, which errors were excepted to by the defendant as follows:

A. The Court erred in refusing to direct a verdict in favor of the defendant at the close of plaintiff's evidence as requested by such defendant, to which ruling the defendant objected, and an exception was saved on behalf of such defendant at the time the ruling was made.

B. That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of all of the evidence, for the reason that there was no substantial evidence for the jury to consider from which the liability of the defendant Edward D. Coffey might be inferred, and in particular, that there was no evidence of a breach of a duty by the defendant Edward D. Coffey.

C. That the Court erred in submitting the matter to the jury at all, for the reason that the sole question for determination was a question of law.

D. That the Court erred in submitting the matter to the jury for the reason that there was no substantial evidence from which any liability of such defendant might be found.

E. The Court erred in instructing the jury in failing to give certain instructions requested by the defendant, and in instructing the jury as the Court instructed the jury, defendant having saved exceptions to such failure to give instructions and to the

instructions as given, all as will more fully appear from the exceptions taken by the defendant at the close of the trial, for the reason that the requested instructions were proper statements of the law in view of the evidence of the case, and that the instructions given, and to which defendant excepted, were not proper statements of the law in connection with such evidence, and were prejudicial to the defendant.

F. That the Court erred in receiving the verdict of the jury in the above-entitled cause for the reason that such verdict is contrary to the evidence, and not supported by any substantial evidence, and for the reason that the plaintiff has wholly failed in his proof to show any liability of the defendant to the plaintiff in any manner whatsoever.

G. That the Court erred in entering judgment following the verdict in the above-entitled matter for the reason that such verdict is not supported by any substantial evidence, and is contrary to the evidence, and the judgment against the defendant and in favor of the plaintiff is contrary to law.

Dated at Anchorage, Alaska, this 1st day of May, 1950.

DAVIS & RENFREW,

By /s/ WILLIAM W. RENFREW,

Attorneys for the Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 1, 1950.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS
AND DISBURSEMENTS

Disbursements

Marshal's Fee, See Exhibit "A".....	\$ 11.50
Clerk's Fees	21.00
Witness Fees, See Exhibit "A".....	239.00
Attorneys	750.00
Transportation Witnesses, See Exhibit "A"	310.80
<hr/>	
Total	\$1,332.30

United States of America,
Territory of Alaska, Third Division—ss.

Buell A. Nesbett being duly sworn, deposes and says: That he is the Attorney for the Plaintiff in the above-entitled cause, and as such is better informed relative to the above costs and disbursements, than the said Plaintiff. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

/s/ BUELL A. NESBETT,

Subscribed and sworn to before me, this 3rd day of May, A.D. 1950.

M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division.

[Seal] By /s/ CHARLES M. KNOTT,
Deputy.

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 3, 1950.

EXHIBIT "A"

Marshal's fees—

Serving Complaint	\$ 3.00
Subpoena	5.50

Witness Fees

Plaintiff—home in Naknek

9 days @ \$9.00 a day	81.00
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Al Ruhl—home in Naknek

7 days @ \$9.00 a day	63.00
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Kenneth Shipley—home in Anchorage

7 days @ \$4.00	28.00
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Joseph Sheahan—1 day @ \$4.00	4.00
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William Smith—home in Dillingham

7 days @ \$9.00	63.00
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Witness fees total	\$239.00
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Transportation of Witnesses

Polimeni & Ruhl—Naknek to Anchorage
and return—644 miles @ 15c per mile .. 193.20

William Smith—Dillingham to Anchor-
age and return 117.60

Total\$310.80

[Endorsed]: Filed May 3, 1950.

MINUTE ORDER DENYING MOTION FOR
NEW TRIAL

Now at this time upon the Court's own motion,

It Is Ordered that motion for new trial in cause No. A-5366, entitled Antonio Polemini, Plaintiff versus Edward D. Coffey, Defendant be and it is hereby denied.

Entered May 5, 1950.

MINUTE ORDER DENYING MOTION TO SET
ASIDE VERDICT AND JUDGMENT AND
FOR JUDGMENT IN FAVOR OF DEFEND-
ANT

Now at this time on Court's own motion,

It Is Ordered that motion to set aside verdict and Judgment and for Judgment in favor of defendant in cause No. A-5366, entitled Antonio Polimeni,

Plaintiff, versus Edward D. Coffey, Defendant, be and is hereby denied.

Entered May 5, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Edward D. Coffey, the above-named defendant, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain final judgment entered by the above-entitled Court in the above-entitled cause on the 27th day of April, 1950, by the terms of which judgment was granted in favor of the plaintiff, Antonio Polimeni, and against the defendant, Edward D. Coffey, in the sum of \$9,200.00, plus attorney's fees to the plaintiff in the amount of \$750.00, and together with costs and disbursements to be taxed by the Clerk of the Court, such judgment having been entered on the said 27th day of April, 1950.

DAVIS & RENFREW,

By /s/ EDWARD V. DAVIS,

Attorneys for the Defendant,
Edward D. Coffey.

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 24, 1950.

MINUTE ORDER FIXING SUPERSEDEAS BOND

Now at this time upon motion of Edward V. Davis, of counsel for defendant, and with Buell A. Nesbett, of counsel for plaintiff not objecting,

It Is Ordered that supersedeas bond in cause No. A-5366, entitled Antonio Polimeni, Plaintiff, versus Edward D. Coffey, Defendant, be, and it is hereby, fixed at \$11,500.00.

Entered May 24, 1950.

[Title of District Court and Cause.]

ORDER

Stipulation having been entered by attorneys for the respective parties that supersedeas bond on appeal in the above-entitled matter might be set at the sum of Eleven Thousand Five Hundred Dollars (\$11,500.00), and the Court being fully advised in the premises, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that supersedeas bond on appeal in the above matter shall be set at the sum of Eleven Thousand Five Hundred Dollars (\$11,500.00), and the judgment will be stayed furnishing of a good and sufficient bond in that sum by the defendant-appellant.

Done in open Court at Anchorage, Third Judicial

Division, Territory of Alaska, this 24th day of May, 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered May 24, 1950.

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 24, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above-entitled Court and to McCutcheon & Nesbett, attorneys for the Plaintiff, and To Whom It May Concern:

Please Take Notice that Edward D. Coffey, defendant above named and the appellant in this action, designates the entire record of this action as the record on appeal and specifically directs that all the records and the files in the Clerk's office pertaining to the above-entitled action are to be included in such records, and among other things such record is to include specifically the reporter's transcript of the evidence introduced on the trial of the cause and all exhibits introduced on behalf of both parties to the action.

Dated at Anchorage, Alaska, this 24th day of May, 1950.

DAVIS & RENFREW,

By /s/ EDWARD V. DAVIS,
Attorneys for Appellant,
Edward D. Coffey.

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 24, 1950.

[Title of District Court and Cause.]

ORDER

Stipulation of counsel for the respective parties having been filed with this Court by the terms of which it is agreed between the parties that appellant may have until the 22nd day of August, 1950, to file and docket the record on appeal in the above-entitled cause, and the Court being fully advised in the premises,

Now, Therefore, it is hereby ordered, adjudged and decreed that appellant may have an extension of time to and including the 22nd day of August, 1950, to file and docket the record on appeal in the above-entitled cause.

It is further ordered, adjudged and decreed that in accordance with such stipulation in the event reporter's transcript has not been delivered prior to the time when the appeal should be docketed in accordance with this order, then the Clerk is directed

to forward the records and files in his office exclusive of the transcript to the Court of Appeals for the Ninth Circuit at San Francisco, California, in order that such cause may be docketed in such Court, and the reporter's transcript may be docketed at a later date after the same has been furnished.

Done In Open Court at Anchorage, Third Division, Territory of Alaska, this 30th day of June, 1950.

ANTHONY J. DIMOND,
District Judge.

United States of America,
Territory of Alaska,
Third Division—ss.

I, the undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of the Order entered in Journal No. 22, Page No. 120, this 18th day of August, 1950.

M. E. S. BRUNELLE,
Clerk of District Court.

[Seal]: By /s/ CLARA RHODES,
Deputy.

Duly verified.

In the District Court for the Territory of Alaska,
Third Division

Civil Action No. A-5366

ANTONIO POLIMENI,

Plaintiff,

vs.

EDWARD D. COFFEY,

Defendant.

April 17, 1950

Before: The Honorable George W. Folta,
United States District Judge.

Appearances:

STANLEY J. McCUTCHEON, and

BUELL A. NESBETT, of

McCUTCHEON & NESBETT,

Anchorage, Alaska,

Appearing for Plaintiff, and

WILLIAM W. RENFREW of

DAVIS & RENFREW,

Anchorage, Alaska,

Appearing for Defendant.

Whereupon, the following proceedings were had:

PROCEEDINGS

The jury is duly drawn, impanelled and sworn. Opening statement made by counsel for plaintiff, whereupon counsel for defendant waives making opening statement.

BILL SMITH

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Nesbett:

Q. Will you speak into the microphone please.

A. Yes.

Q. State your full name please.

A. William DeVille Smith.

Q. How do you spell that?

A. D-e V-i-l-l-e.

Q. Smith? A. Yes.

Q. Do you know Mr. Polimeni, the plaintiff in this action? A. Yes, I do.

Q. For how long? A. Since 1943.

Q. Where did you meet him? A. Naknek.

Q. Under what circumstances, if you please?

A. Oh, in connection with my flying I have seen Tony around Bristol Bay. He was a cook and fisherman.

Q. What is your business?

A. I have a flying business. I am a pilot.

Q. Are you a bush pilot in the Bristol Bay area?

A. Yes, I am.

(Testimony of Bill Smith.)

Q. Mr. Smith, do you have occasion in your bush piloting to operate in and out of Naknek?

A. Yes, in the summertime I have connections with some of the canneries there and am stationed there.

Q. Do you know whether Mr. Polimeni conducted a business in South Naknek?

A. Yes, I knew him very well.

Q. As a matter of fact you were familiar with his business? A. Yes.

Q. And as a matter of fact wasn't your airplane moored some 200 yards from his business?

A. Yes.

Q. Did you frequent his business?

A. Yes, yes, I did.

Q. Do you know when Mr. Polimeni acquired this restaurant business? A. 1945.

Q. Were you living in Naknek at that time?

A. Yes, in North Naknek.

Q. What was your business at that time?

A. Deputy United States Marshal. [2*]

Q. You had known Tony about three years at that time? A. Yes.

Q. Can you describe that building as of the time Mr. Polimeni acquired it?

A. Yes, a large story and a half building, or two story, a pretty good building——

Q. Pardon me, I asked you to describe it as of the time he acquired it.

A. When he bought it it was only a shell.

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Bill Smith.)

Q. Can you state roughly the type of construction in the building?

A. It was a frame building.

Q. Did you have occasion to observe Tony through the next two or three years through his operation of the building and operation in connection with the improvements? A. Yes, I did.

Q. Do you know what improvements he made?

A. Yes, Tony practically rebuilt it, enlarged it and finished it complete.

Q. Do you know how many rooms were in the building?

A. To the best of my knowledge four downstairs and five up.

Q. Do you know the floor area?

A. Yes, the main building was 30x30, and I know there was a windbreak on the front and I believe a porch on the back.

Q. And a half story above? [3] A. Yes.

Q. Did he pour a basement in the building?

A. Yes.

Q. You helped him with the building?

A. Yes.

Q. You knew what was going on in his business?

A. Yes.

Q. He asked your advice before he would make a move? A. Yes, he did.

Q. Now, on or about March 30, 1948, you were in and out of Naknek quite frequently, were you not?

A. Yes.

Q. Would you describe to the court and jury the

(Testimony of Bill Smith.)

state of the building with respect to completion at that time?

A. The building was finished except for the exterior. Tony had hardface brick to finish it. He had lined it with plywood and had new equipment, new kitchen range and full restaurant equipment.

Q. What type business was he conducting?

A. A restaurant and I believe he had a bar and wine dispensary.

Q. Did he do a reasonably good business?

A. Yes, he had actually more than he could handle.

Q. Do you know how long he operated that business?

A. About 30 months to my knowledge. [4]

Q. You know what he did then?

A. Tony went fishing.

Q. What did he do, close his business down?

A. He closed his business.

Q. You know why he did that?

A. Yes, during the summer the canneries——

Mr. Renfrew: Object to that as an opinion.

Mr. Nesbett: I asked him if he knew, Your Honor.

The Court: He may answer, if he knows.

A. Yes, during the summer the cannery feeds its own employees. Tony had an arrangement to feed the employees before the cannery opened. Also there was a large transit trade, but then there was no business during the fishing period.

(Testimony of Bill Smith.)

Q. Have you owned property in Naknek, Mr. Smith? A. Yes.

Q. Are you familiar with property values in that area?

Mr. Renfrew: Object, Your Honor, until it is shown that what he refers to is the town of Naknek, or the cannery site at South Naknek.

The Court: I think he should designate the place.

Q. Are you familiar with property values in North Naknek and South Naknek.

A. Yes, they are identical. I am very familiar with both [5] sides of the river.

Q. Would you state what you consider to be the value of Mr. Polimeni's building and improvements and equipment as of June 1, 1948?

A. That was without the inventory?

Q. Without inventory—building and equipment?

A. Twelve or thirteen thousand dollars.

Q. Do you know what inventory Mr. Polimeni had?

A. It was in excess of three thousand dollars.

Q. How do you know that, Mr. Smith?

A. I helped Tony with several of his transactions and I saw a record of his inventory.

Q. I hand you a copy of the bill of particulars which is on file in this action. Just quickly—

A. But not too quickly.

Q. —for the reporter would you run down the items on this bill of particulars and state whether or not you knew those items were in the building as of June 1, 1948, and your opinion of the value?

(Testimony of Bill Smith.)

A. You want me to read it?

Q. Just take each item separately.

The Reporter: Would you please get back about six inches from the microphone.

A. Main building, 6 tables \$12.00 a piece, \$72.00. I believe that is correct. [6]

The Court: I think now you are too far away for us to hear you distinctly.

A. One dining table, 4x8, \$45.00. I have seen that and that was worth that. One china closet \$120.00. I have seen that. It would cost that to replace it. Two dressers with mirrors, \$80.00 a piece, or \$160.00. They are worth that. Twelve chairs at \$5.00 a piece, or \$60.00. I think that is conservative. One double bed, spring and mattress at \$80.00. Four three-quarter beds, \$100.00 a piece. I have seen the beds. They were Simmons beds with innerspring mattresses, and I believe that is what they were worth. One cot with a spring and mattress—\$50.00. Blankets, sheets, pillows and cases \$50.00.

Q. Is that too high, or too low?

A. That is a fair valuation, I would say of that. One cook stove \$400.00. I know how Tony bought it. He bought it wholesale through the cannery. It was worth about \$700.00. They transported it for him for nothing.

Q. It would cost the average person \$700.00?

A. \$700.00 to replace it. One hot water tank, 80 gallons, \$39.00. I had seen a bill on that \$39.00. One

(Testimony of Bill Smith.)

automatic electric water pump and pipe \$226.00.
It was worth that.

Q. Did Mr. Polimeni incidentally do anything to that well?

A. Yes, I believe he dug a new well. There had been a well on the property, but I think he dug a new one.

Q. Do you know what that cost? [7]

A. Quite a few dollars.

Q. It is not listed there? A. No.

Q. One light plant \$350.00. I have a light plant myself and I believe that is conservative. One lot of pots and pans \$150.00. I know that Tony had a very good stock of pots and pans.

Q. Would you say he put down too much for those pots and pans?

A. No, he had far in excess of that. He had been gathering pots and pans for years to my knowledge. One lot of crockery dishes \$300.00, and Tony had that many. Had them in stock. One lot of bar and wine glasses for the bar \$80.00, and I know he had more than that because I bought one lot myself for him that was \$50.00. They burned up in the fire. He never used those at all. Personal clothing and gear \$500.00. I know that Tony lost all his clothing, tailormade suits and shirts. He lost everything. Cash and currency burned—buried in the basement, \$2,000.00. I know that he had a lot of cash on hand.

Q. You know where he buried it?

A. Yes, he hid it, stuck in his rolls of siding.

Q. That hardface brick siding?

(Testimony of Bill Smith.)

A. Yes. He had told me previously that he had some money put away. In fact I advised him not to have too much up stairs. [8]

Q. Did you have any interest in that business?

A. No, didn't have any interest.

Q. You have any interest in the outcome of this case? Does it affect you one way or another?

A. No.

Q. Why did you come down to testify? This is your busy season?

A. Yes. Tony is a very good friend of mine and I know he has nothing more. The next is the inventory of food.

Q. Yes. We might as well go briefly through that. Look at it and state whether or not you think it is a conservative inventory?

A. It shows one lot of canned food \$3,047.24. There is a full itemized list.

Q. What is the total?

A. \$3,047.24. There is also beer and wine.

Q. Do you buy your groceries in Naknek once a year for the year?

A. I buy them in Dillingham and——

Q. What do they usually cost you for the year?

A. About \$2,000.00.

Q. For you and your family? A. Yes.

Q. Look at it and state whether or not in your opinion any of them are too large or too small? [9]

A. No, the prices appear correct to me. They are the same prices that I paid. Do you want an inventory of the beer and wine?

(Testimony of Bill Smith.)

Q. Yes, and comments on that inventory. Do you know whether it existed?

A. Yes, I had seen it and helped Tony purchase it, advised him where to buy it.

Q. Would you comment on those items?

A. On this?

Q. No, on the beer and wine.

A. Six cases of bottled beer, \$7.00 a case, \$42.00. \$7.00 that was wholesale. I know he had at least that much. Three cases of Sherry wine \$75.00. He had Sherry wine. I have seen it. Two cases of Claret wine, \$50.00. I have seen Claret wine. Three cases of Port wine, \$72.00. The total so far is \$8,368.24.

Q. Did Tony have a juke box in that room downstairs?

A. I had seen one previous to the fire, however, at the time of the fire I don't know whether it was in there or not. I know he had a combination radio and record player. It was worth \$300.00.

Q. That isn't shown on the inventory?

A. No, it isn't shown.

Q. How do you know?

A. Another fellow there was responsible for it and as Tony [10] didn't have the money I paid for the record player. I paid about \$300.00.

Q. You know what that juke box cost Tony?

A. No, I don't.

Q. Didn't you tell me yesterday?

A. The juke boxes were \$700.00, but I am not sure the juke box was in there when the place burned down.

(Testimony of Bill Smith.)

Q. I am just asking about the value.

A. \$700.00.

Q. Do you know from whom Tony bought this building originally? A. Yes. William Regan.

Q. I believe that was 1945? A. Yes.

Q. When you were Deputy United States Marshal? A. Yes.

Q. Did anyone else to your knowledge claim to own it? A. No.

Q. Were you in South Naknek, or Naknek, on July 20th, 1948? A. No, I wasn't.

Q. Where were you on that date?

A. In Anchorage.

Q. Did you return subsequently?

A. I returned a couple of days later.

Q. Did you have occasion to visit the site where Mr. Polimeni's business was located.

A. Yes. [11]

Q. What did you observe when you went back to that place? A. A pile of ashes.

Q. Did you talk the fire over with the residents of Naknek? A. Yes.

Q. You know whether or not anything was salvaged from that fire?

A. No, there was nothing. Even the sidewalk in front of the building was destroyed.

Q. Was that a wooden sidewalk?

A. Yes, it was.

Q. When did you next see Tony after you discovered the fire had leveled the property?

(Testimony of Bill Smith.)

A. About two weeks later.

Q. You know whether or not Tony had attempted to procure insurance on that property before the fire?

A. Yes.

Q. State what you know about his efforts to procure the insurance. What you know and what you heard.

A. I read some of the letters Tony wrote and Mr. Coffey wrote, and Tony asked me—asked my advice several times.

Q. On what points?

A. On the inventory. How to make the inventory up and I know that he was a little perturbed about the slowness——

Q. Did you discuss the fire insurance with him about that time? [12]

A. I discussed this insurance.

Q. I forgot to ask if you believe that total on the inventory is approximately correct?

A. I believe it is conservative, if anything.

Q. Is Tony pretty well known around that area, Mr. Smith?

A. Yes, he is very well known.

Q. Is he well liked?

A. He is very well liked.

Q. You know whether or not Mr. Polimeni has a speech impediment?

A. Yes, a very bad one. He is tongue tied and he is deaf also.

Mr. Nesbett: I believe that is all, Your Honor.

Mr. Renfrew: Just a minute, Mr. Smith, I would like to ask you a few questions.

(Testimony of Bill Smith.)

Cross-Examination

By Mr. Renfrew:

Q. How long have you been acquainted with Mr. Polimeni? A. In 1943.

Q. At that time were you located at Bristol Bay?

A. Yes, I fished down there that year.

Q. I believe in response to a question by Mr. Nesbett you stated he asked your advice before he made a move? A. Yes. [13]

Q. Was that condition true for some period of time? A. Yes.

Q. Do you infer that was true from '43 on?

A. Not necessarily. He had asked my advice from 1945. That I would swear to.

Q. Well, with reference to the operation of his restaurant?

A. He had no restaurant in 1943.

Q. No, I thought your answer was that you would swear that he asked your advice in '45?

A. Yes, he did.

Q. Was that with respect to the operation of the restaurant?

A. With respect to the building.

Q. Prior to that time he didn't ask your advice?

A. My advice isn't—

Q. Wasn't he godfather to another pilot—McGregor. Tony bought McGregor an airplane and got his advice until sometime in 1945.

A. Not entirely. I advised Tony not to buy an airplane for McGregor.

(Testimony of Bill Smith.)

Q. He didn't take your advice at that time?

A. I don't think he took anybody's advice. McGregor saw him.

Q. As a matter of fact, Mr. Polimeni isn't fluent in the English language, not merely because of a speech impediment. Isn't that true? He doesn't understand English?

A. No, you are mistaken, Bill. He doesn't understand Italian [14] very well either. I asked some of the Italians year before last and last year too if they could understand him and they said not very well.

Q. You misunderstand my questioning. Isn't it a fact it is almost impossible to understand him in any language?

A. I think I understand him.

Q. You don't have any trouble at all?

A. No more than about fifty per cent of the people, in Bristol Bay.

Q. That don't answer the question, because the jury and the Court are not interested in fifty per cent of the people in Bristol Bay. Do you mean to infer to the jury that you have no trouble in conferring with Mr. Polimeni at all?

A. Yes, I have difficulty. I said he is tongue tied.

Q. Can he write English?

A. Yes, to some extent. He has never written me a letter.

Q. Have you ever seen him write a letter?

A. I have seen him write, but it is a very painful process.

(Testimony of Bill Smith.)

Q. You have seen him attempt to write, but could you read what he wrote?

A. Yes, what he wrote I could read. I have seen him write his name and I can read that.

Q. Can he read English? A. Yes.

Q. If he picks up a newspaper he can understand it? A. He understands most of it. [15]

Q. Is he sufficiently fluent in the reading and writing of English to be able to read a newspaper?

A. Tony was granted citizenship and I believe that is one of the requirements.

Q. Regardless of the requirements of citizenship, you have been acquainted with him a good many years and been his advisor, would you say he can read a newspaper and write—say he can write a little?

A. I know he can read. I don't know how well he can write. I have seen him write a little bit.

Q. What time in 1945 did he open the restaurant, if you know?

A. In March. It might have been previous to that.

Q. This was in the year '45?

A. No, no, it was in '48.

Q. Do I understand the restaurant had never been opened by Polimeni prior to March, 1948?

A. Not to my knowledge.

Q. You had been there since '43, hadn't you?

A. Yes.

Q. You would know if it was operated prior to the spring of '48?

(Testimony of Bill Smith.)

A. Yes, I should have known. I didn't do too much business in South Naknek until '45. I was on the other side of the river.

Q. So far as you know this restaurant started to operate in [16] the spring, probably in the month of March, 1948? A. Yes.

Q. Where did Mr. Polimeni get his supplies to open that restaurant?

A. From the sources—from the Alaska Packers in South Naknek and a lot from Anchorage, had them flown in.

Q. I believe you stated you had helped him make purchases? A. Yes.

Q. And you were sufficiently well acquainted with his provisions to state that he had that on hand?

A. I wasn't familiar with every kind.

Q. I understand you to say this inventory was very conservative.

A. My inventory at home runs about \$2,000.00.

Q. Were you judging your own inventory here, or his inventory from your personal knowledge?

A. I know what he had to a large extent, and I also know what was necessary in Bristol Bay.

Q. If you know what he had to a large extent I want you to state how you know what he had to a large extent.

A. I talked over some of his purchases from the Alaska Packers Associated. They advanced him a large amount of goods on credit and in return he fed some of their men.

(Testimony of Bill Smith.)

Q. Allright that would be in consideration of his feeding their men, wouldn't it? [17] A. Yes.

Q. He fed their men and then closed the restaurant?

A. No, he didn't close it immediately.

Q. It was closed at the time of the fire?

A. That is correct.

Q. In the interim he fed their men?

A. That was only part of his business.

Q. But it would be a reasonable presumption that they ate up the stuff that was furnished by the cannery.

A. Part of it. They didn't get all the supplies from the cannery. The cannery furnished them material and they wouldn't eat that up.

Q. Do you have any personal knowledge of what was in the restaurant at the time of the fire?

A. Yes.

Q. What is that based on?

A. Shortly before the fire Tony conducted me very proudly through the whole building.

Q. Can you give the exact date?

A. No, I can't. I made a trip outside to get a new plane and when I got back Tony showed me.

Q. Do you recall when you got back with your new airplane?

A. No. I have the record in Dillingham.

Q. Unfortunately, we can't wait until you can hear from Dillingham. You don't often go out and get a new airplane. [18]

A. I have the last two years.

(Testimony of Bill Smith.)

Q. Can you estimate?

A. I think it was the latter part of May or the 1st of June.

Q. When does the fishing season open?

A. About the 1st of July.

Q. Do you know when he closed the restaurant there?

A. It was about the middle of June.

Q. Isn't there more than one fishing season?

A. Yes, there are three fishing seasons. When the ordinary persons speaks it is of the red run, but there is also the King Salmon and Tony went to another river for King Salmon.

Q. When was that, about the latter part of May or June 1st you looked through his establishment?

A. Yes.

Q. When had you been there previous to that?

A. I don't know. I had been in the Bristol Bay Area some time.

Q. I understood from your testimony you had just returned from a trip to the States?

A. Yes.

Q. How long were you away?

A. About a month.

Q. So then I take it there was about a month prior to the time he took you through there that you hadn't been there at all?

A. That is correct. [19]

Q. You went into it just once?

A. Several times a day.

Q. Going through and counting the inventory?

(Testimony of Bill Smith.)

A. Yes. I ate there and I was through the building. There was no barber and Tony cut my hair.

Q. Were you there the day he closed it up?

A. No. I was in South Naknek, but wasn't in his building.

Q. Do you know how long prior to the time he closed it up that you were in the place? Understand what I mean?

A. Yes. It would only have been two or three days.

Q. After you returned from the States you were a boarder with Tony?

A. No. I ate at the cannery some of the time and with Tony to give him the money—the business.

Q. That is an amphibious craft? A. Yes.

Q. Your place was across the river?

A. I was stationed in South Naknek.

Q. You flew a Seabee? A. Yes.

Q. That is an amphiibous craft? A. Yes.

Q. Didn't you keep that down on the water there? A. Yes.

Q. The tide there is one of the best in Alaska? [20]

A. Yes.

Q. How often does that tide come in?

A. A couple of times a day. As you say the Seabee was amphibious and it was above the high-water mark.

Q. You were flying it as much as possible?

A. Yes.

(Testimony of Bill Smith.)

Q. So you really didn't have time to inventory Tony's stuff? A. No.

Q. You are at this time giving what you consider a rough estimate of what you thought Tony had?

A. Yes, but as I said before he had a lot of possessions that wasn't on this.

Q. You didn't make up this bill of particulars?

A. No, I didn't.

Q. And you understand this was furnished by the plaintiff in this case? A. Yes.

Q. To advise us what he lost?

A. Yes, I had a list at the time he applied for insurance and I also saw this.

Q. Did you assist him in his application for insurance, Mr. Smith?

A. I read the letters and told him they were all-right.

Q. You mean the letters that he wrote?

A. They were written for him. [21]

Q. Who wrote the letters for Mr. Smith, or Mr. Polimeni, excuse me?

A. I know that the school teacher wrote a couple of them.

Q. Do you know anybody else that wrote for him?

A. Yes, the storekeeper, or bookkeeper at the cannery.

Q. It is my impression from your testimony that you tried to infer that after he would go to the school teacher or the bookkeeper at the store he came around to ask you if the school teacher or book-

(Testimony of Bill Smith.)

keeper were doing alright? A. Yes, he did.

Q. Are either of those people here to testify?

A. No.

Q. You have stated that the valuation on one side of the river is identical with the valuation on the other side of the river. You don't really mean that?

A. Well, I don't know. If you buy lumber to build a place on one side it costs the same.

Q. Isn't there a population in North Naknek that supports a store and other business?

A. No, there is only one store in——

Q. I am speaking of conditions in '48, at the time of this fire. A. Yes.

Q. Isn't it true there were three grocery stores in North Naknek and none in South Naknek, except the cannery? [22]

A. No, you are wrong. There were only two stores, one that was in the process of going out of business. However, the cannery in South Naknek is a large store, and supplies the people in the whole territory. There are an equivalent number of people in South Naknek as well as North Naknek.

Q. On what do you base your claim of value as of June, 1948, of \$13,000.00, on what do you base that, Mr. Smith?

A. Well, I figure his building was worth about \$10,000.00 and I believe he had at least a couple thousand dollars worth of stock in it. I had talked to the cannery superintendent about it.

(Testimony of Bill Smith.)

Q. Let's take the building. You say he purchased the building in '43, I believe from Billy Regan, the former Commissioner there?

A. Bill Regan was the Commissioner.

Q. You say he purchased the building from him in 1943? A. I didn't say '43.

Q. I misquoted you then. What year was it?

A. Well, Bill Regan and Tony talked over the purchase of the building I think in '45.

Q. Do you know when he purchased the building?

A. The purchase was a long drawn out affair.

Q. If you know about it, please tell me, Mr. Smith. You inferred you were consulted?

A. You asked me the question. [23]

Q. Alright, what do you know about Mr. Poli-meni's purchase of this building in '45?

A. I know he made a deal with Bill and Bill was satisfied with the deal, but the whole deal was not consummated then. I even know what you want me to say, but you can ask me and I will answer it.

Q. I will ask you what I want to to see if you know? A. You ask me.

Q. I just did. We are not here to waste time. Let's not banter each other, let's get down——

A. The entire deal was not consummated then, but part was consummated at a later date after Bill Regan's death.

Q. Do you have any knowledge as to what the deal was? A. Yes.

Q. Will you state what the deal was.

(Testimony of Bill Smith.)

A. I don't think it has too much bearing on this.

The Court: The witness should answer each question, unless there is an objection and it is sustained.

Mr. McCutcheon: To state what a long drawn out deal is isn't——

A. He hasn't asked me the question.

The Court: When the question is asked this Court will rule on it.

Q. Mr. Smith, the question I am trying to ask you is quite simple. I want you to tell the Court what the deal was between [24] Mr. Polimeni and Mr. Regan?

Mr. McCutcheon: Objected to. It has no bearing on this case.

Mr. Renfrew: This is cross-examination and it was brought out.

The Court: You may answer.

A. Bill Regan and Tony had talked over with me in my house in '45 Tony's purchase of the shell, the frame of the building, from Bill Regan and Bill Regan owed Tony a considerable amount of money and Tony was to get the building for the debt. At the time of Bill's death his assets were all mixed up. He was administrator for several estates and I don't believe all these were settled until this day. He was also in with the Alaska Packers Association and their records were mixed up so Tony's deal was also mixed up. Hal Marchbanks succeeded Regan as Commissioner, and in order to clarify the whole thing he sold the building to Tony.

(Testimony of Bill Smith.)

Q. That has been quite lengthy. Now, tell us what he sold it for?

A. I don't know for sure.

Q. Did he ever pay for it?

A. He paid part of it and Marchbanks told him he didn't have to pay the rest of it.

Q. As a matter of fact the ownership of that building was involved in an estate which Regan was handling as Commissioner? [25]

A. Regan told me in '45 that as U. S. Commissioner he owned the building.

A. As I said his affairs were all mixed up.

Q. You have never seen a deed or bill of sale?

A. I don't think there is a deed to any of the property in Naknek, except the cannery property.

Q. Have you seen one?

A. I have not seen one.

Q. Do you know how much money Tony paid for it?

A. I know approximately and as I said he only bought the shell.

Q. Yes, but do you know how much money he paid?

A. For what he bought he paid Marchbanks, I believe, I am not sure, \$1200.00.

Q. You mean he agreed to pay \$1200.00?

A. Yes.

Q. But only paid a portion of that?

A. Yes.

Q. That was in '45? A. No.

Q. What year was that?

(Testimony of Bill Smith.)

A. I believe that was '48.

Q. Now give us an estimate whether it was January, February or March?

A. I don't know. Bill died in the spring. I believe he died [26] in 1946, and it was a few months later that Tony bought it.

Q. That was in '46 then?

A. I am not sure.

Q. Well, upon what do you base the value of the building at \$13,000.00, or the portion of the building that was not included in equipment. I think you said about \$2,000.00 worth of equipment, so that would be \$11,000.00.

A. I know what the building would be worth and I also know the amount of material Tony put in it and what he bought.

Q. What did he buy to put in it? That is what I am trying to get from you.

A. This is a very complicated deal.

Q. Not more complicated than the last one?

A. No. The Alaska Packers decided to destroy Bill Regan's home. It was an old building on their property, and they told Tony that if he tore it down he could salvage it. So Tony hired men and paid them to tear the building down, and he also bought considerable material from the Alaska Packers.

Q. Then the value over what he paid for the labor would be the salvaged lumber?

A. No. He got other material. He bought brick siding from the Naknek Trading Company, I believe. I know he bought plywood.

(Testimony of Bill Smith.)

Q. Those facts could all be substantiated from the invoices? A. Yes, they can. [27]

Q. Alright, Mr. Smith, you said you helped him purchase these supplies. I suppose you mean you gave him advice? A. Yes.

Q. I will ask you whether or not you ever saw any invoices for these supplies?

A. I saw some of the invoices.

Q. Does he have them?

A. His building burned down and he had most of his records in it.

Q. Did you ever advise him to go back to the people he bought the stuff from and get copies?

A. Yes.

Q. Did he do that?

A. I went to the Alaska Packers Association. His bill with them for that spring was between five and six——

Q. Just answer my question.

Mr. Nesbett: I object. He is doing his best.

The Court: He may be doing the best he can but he is not answering.

A. As I told——

The Court: Of course, it is impossible to educate every person to answer questions in the brief time they are on the stand.

answer. [28]

The Court: You should qualify your answer after you make the statement, but not before.

Q. The question is did you get the invoices, or

(Testimony of Bill Smith.)

do you have them? A. No. Can I qualify?

Mr. Nesbett: Your Honor.

The Court: I have already told him that he could qualify his answer, or explain his answer.

A. I went to the Alaska Packers Association in the spring of this year in Seattle and asked for the invoices for Tony and they told me it would be a very long drawn out process since their bookkeeping was set up so they could not put their fingers on it, but if it became necessary in the future they could probably do so.

Q. What about the other people; the Naknek Trading Company?

A. I didn't go to the Naknek Trading Company.

Q. In other words, you limited your inquiry to the one you mentioned?

A. Yes, the Alaska Packers.

Q. And you did not get copies of the invoices?

A. No.

Q. Do you know how long the premises were vacant, or whether they were vacant at all prior to the fire?

A. Yes, they were vacant for a short period prior to the fire.

Q. I will ask you if you could state approximately the length [29] of time they were vacant prior to the fire? A. Approximately, yes.

Q. Will you do so?

A. Ten days approximately.

Q. Then, if the fire occurred on the 20th, you

(Testimony of Bill Smith.)

don't think the premises were occupied after the 10th of July, I think it was?

A. It is approximate. I am not sure.

Q. A little while ago you mentioned that Tony went fishing for the King Salmon and that that season opened on the 15th of June?

A. No, I didn't say the 15th of June.

Q. Maybe my recollection is wrong.

A. I said approximately. I don't know the dates exactly.

Q. If he left approximately the 15th of June and the fire didn't occur until the 20th of June and you feel the property wasn't vacant can you say who stayed there?

A. Al Rule and Hansen and a couple of other people operated the premises.

Q. Were they operating on a share basis, or something? A. Yes.

Q. What are their names?

A. Alfred Rule.

Q. Who else? A. Nan Hansen. [30]

Q. Are they here to testify?

A. Mr. Rule is here.

Q. Now, you have confined your testimony to a building, Mr. Smith, was there more than one building destroyed by this fire? A. No.

Q. Isn't it true that Mr. Polimeni had more than one building in conjunction with his operations there?

A. Yes, but I would like to qualify that statement, if I may.

(Testimony of Bill Smith.)

Q. I don't see how you can qualify it.

Mr. Renfrew: If the answer is yes, Your Honor, it doesn't give me a chance to go on and ask any more questions. How can you qualify the fact that——

Mr. Nesbett: Maybe Mr. Renfrew knows the answer, but I don't like the way he quarrels with the witness.

The Court: Of course, it is impossible for the Court to determine what he has in his mind.

Mr. Nesbett: Will Your Honor give him the opportunity?

The Court: Yes. He may have the opportunity.

A. Tony had a small privy and a small shed.

Q. I will ask you whether or not one of these buildings which was destroyed by the fire was for housing the light plant?

A. It was for housing the light plant?

Q. Yes. Wasn't one of these small buildings the one that had the light plant in it? [31]

A. It did not have the light plant in it. It was built for the light plant.

Q. Was the light plant ever in there?

A. Not to my knowledge. I saw it running on the back porch.

Q. Then you would say that a building approximately eight by ten feet was not used for housing the light plant?

A. It was built for housing the light plant.

Q. It was not used—housed is the word I used?

A. Not to my knowledge.

(Testimony of Bill Smith.)

Q. Do you know wether or not it was?

Mr. Nesbett: Quarrelling with the witness again, Your Honor.

The Court: He didn't say it in an affirmative way, but in a negative way. If he says it is not to his knowledge I don't see how you can pursue that inquiry any further.

Mr. Renfrew: Maybe I misunderstood him, Your Honor, but this witness is very reluctant to——

Mr. Nesbett: If the witness is reluctant it will be obvious to the jury.

The Court: You may proceed and ask your next question.

Q. Mr. Smith, a moment ago you stated that the light plant was not in this building, but the building was put there for the purpose of housing the light plant? A. Yes. [32]

Mr. Nesbett: If he said it. All he can ask is did he so state.

The Court: He can restate it in his own words. Objection is overruled. You can recite the testimony as counsel understands it.

Mr. Renfrew: I will restate it so you can correctly understand what I am trying to elicit from Mr. Smith.

Q. I understood you to testify a few minutes ago that this building was erected for the purpose of housing the light plant, but the light plant had been on the back porch of the house? A. Yes.

Q. And then you said to the best of your knowledge it was not in the shed? A. Yes.

(Testimony of Bill Smith.)

Q. Do you know positively whether it was in the shed or not? A. No, I don't know.

Q. Then do you know whether or not it was destroyed by the fire? Did you ever look in that shed after the fire?

A. Not immediately following the fire.

Q. Do you know how long it was after the fire before Mr. Polimeni got down to Naknek?

A. It was only a few days.

Q. By a few days you mean more than two and less than a week?

A. It was approximately a week. [33]

Q. Do you know who looked after his equipment or what he had around there during that interim after the fire?

A. He had nothing left that was worth anything to my knowledge.

Q. Do you know whether or not Mr. Rule or Mr. Hansen had anything to do with looking after his affairs while he was gone? A. Yes.

Q. Well, did they? A. Yes.

Q. There was another building about six by eight which was approximately twenty feet from the main building, and it was made into separate rest rooms with shields for entrances. That was not destroyed either was it? A. No.

Q. You have no personal knowledge, do you, Mr. Smith, of any of the transactions between Mr. Polimeni and Mr. Coffey, other than the letters which you read and concerning which he sought

(Testimony of Bill Smith.)

your advice about which you have previously testified, is that right?

A. Well, there is something further. There could be more.

Q. That you and Mr. Polimeni prior to the time he had the fire did you have any further discussion with him concerning this insurance other than what you have testified?

A. He talked to me about it almost every day.

Q. He talked to you about his insurance almost every day before the fire?

A. When he could catch me.

Q. When did he start talking to you almost every day?

A. After he showed me his building. Tony has been in the habit of asking me, as I said before, for years and when the people tell him something he comes to me and asks me if it is correct.

Q. Was your conversation—were your conversations limited to merely advising him that he should have insurance? A. No.

Q. What with reference to these letters, Mr. Smith, did you ever write anything for him in connection with the application?

A. No. I didn't have time to make an inventory for Tony, but he showed me the inventory and asked me if they were correct and asked me if to my knowledge they would be acceptable.

Q. You have reference to his letter of April 17th. Are you familiar with that?

(Testimony of Bill Smith.)

A. I don't remember the date, but I read the letter with the inventory in it.

Q. Did you see a letter with the inventory in it?

A. I saw an inventory and I recall letters.

Q. Did you ever see a letter addressed to the Coffey Agency that contained an inventory?

A. I seen the same letters that you have here. [35]

Q. You saw them in Mr. Nesbett's office, didn't you? A. Yes and I saw them before.

Q. When he received them?

A. Approximately the same letters.

Q. I inferred from your testimony a few moments ago that an inventory which Mr. Polimeni sent Mr. Coffey——

A. I saw an inventory and he told me he was going to mail it. I don't know whether he did or not.

Q. Was that the extent then of your conversation with him that the inventory would be right and that you approved the letters he wrote?

A. Yes.

Q. So far as you know that is all you know about his request and application for insurance, just what those letters show and that you advised him that the letters were right? A. I suppose so.

Q. If there is anything else that you could help the jury with you are at liberty to do so.

A. I cannot recall anything that would be pertinent.

Mr. Renfrew: I think that is all.

(Testimony of Bill Smith.)

Re-Direct Examination

By Mr. Nesbett:

Q. What do you mean there might be more, Mr. Smith, are you [36] referring to the receipt that I mentioned? A. Yes.

Q. Tell them about it. You talked to the school teacher up there, didn't you?

Mr. Renfrew: Objected to as hearsay.

A. You wanted to know about it. You will get it. From what Mr. Polimeni told——

The Court: Counsel has a right to object to anything based on hearsay no matter what he asked, unless he asked for the hearsay, and he hasn't done that.

Q. Did you cause me to commence a search for a certain receipt that was alleged to have been signed by Coffey? A. I didn't understand——

Mr. Nesbett: Will the reporter read the question, please?

The Reporter: Did you cause me to commence a search for a certain receipt that was alleged to have been signed by Coffey?

Q. The answer? A. Yes.

Q. You know whether or not I wrote letters and made certain attempts to locate that receipt?

Mr. Renfrew: Object to this as self-serving and also hearsay. If Mr. Nesbett would like to testify I wouldn't object to that, if he wants to take the oath. [37]

(Testimony of Bill Smith.)

Mr. Nesbett: I will drop it, Your Honor. I assumed that he wanted to know.

The Court: I assume that he wanted to know by other than hearsay.

Q. Mr. Smith, you have never had any financial backing from Mr. Polimeni?

A. No, I haven't.

Mr. Renfrew: Object as improper re-direct and has no bearing at all.

The Court: It is improper re-direct unless you ask for permission to ask the question.

Mr. Nesbett: Your Honor, the question was on cross-examination "Did Tony ever buy an airplane for you?" A. No, he never did.

Mr. Nesbett: I think I have a right to go into that again.

The Court: You have a right to go into everything he brought out on cross, but I thought you went into this on direct.

Mr. Nesbett: Yes, but Mr. Renfrew says did he ever buy an airplane for you.

The Court: If it is anything new in addition to what has already been gone into, yes.

Q. I asked if you ever received any backing?

A. No, I have never received one penny from Mr. Polimeni. [38]

Q. Now, do you know whether or not Mr. Polimeni was employed by Mr. Regan the owner of this building that burned? A. Yes.

Q. You know how long Mr. Polimeni worked for him? A. For a period of several years.

(Testimony of Bill Smith.)

Q. You know whether or not Mr. Regan paid him for his work? A. No, he didn't.

Q. What was the arrangement between Regan and Polimeni, if you know?

A. Mr. Regan had several children and his wife was dead, and as Tony had no work in the winter he did the cooking.

Q. Was he to receive anything as compensation for that work? A. Yes.

Q. How much? A. I don't know.

Q. Do you know whether or not he ever received anything for that work?

A. I don't know. I know he and Bill discussed it.

Q. You know whether or not he was allowed anything for that as payment on the building?

A. Yes.

Q. How much?

A. Bill Regan told me he was going to——

Mr. Renfrew: Object as hearsay.

The Court: Sustained. It is objectionable [39] as hearsay.

A. They both told me——

The Court: It would still be hearsay. If you have any personal knowledge you may state.

A. They talked over the arrangement with me in my office when I was marshal.

Q. Then you know? A. Yes.

Q. What was it?

A. There were two arrangements. First Tony

(Testimony of Bill Smith.)

and Bill were to be partners and later Tony was to have the building.

Q. Under what conditions?

A. As payment for services to Regan.

Q. Did Mr. Polimeni get the building?

A. Not from Regan.

Q. Who did he get it from?

A. Marchbanks.

Q. Regan died before the deal was ever completed? A. Yes.

Q. Has anyone in Naknek ever objected to Mr. Polimeni's ownership?

A. Not to my knowledge.

Mr. Renfrew: Objection—out of the scope of this man's knowledge.

The Court: It is immaterial. Didn't have [40] any value.

Q. Where was this other building that Tony got? Where was it located in South Naknek?

A. I know, but I have forgotten now.

Q. Was it adjacent to the building that burned, or near there?

A. No, he moved it to that site.

Q. Then what did he do?

A. I don't quite understand.

Q. With reference to the building you say Tony hired men and tore it down to use the material?

A. He used what he could.

Q. Did the material from that building go into the building that he subsequently built?

A. Yes, what he could use.

(Testimony of Bill Smith.)

Mr. Nesbett: I believe that is all.

Mr. Renfrew: Just one more question, Mr. Smith.

Re-Cross-Examination

By Mr. Renfrew:

Q. You know whether or not the building which is the original building here and the original shell I believe you stated purchased from Marchbanks who acted as Administrator for Regan, was that building—did it belong to Regan or did it belong to an estate? [41]

A. Anything I could say at this point would be hearsay.

The Court: If it is hearsay you won't be able to answer.

Q. Of your own knowledge you don't know?

A. I know so far as I can know without seeing a deed.

Q. You stated a few moments ago that there were never any deeds in Naknek, I believe?

A. I haven't seen any.

Mr. Renfrew: That is all, Mr. Smith. Thank you very much.

The Court: The Court will now be in recess for ten minutes.

(Whereupon, court is recessed for ten minutes, and at 3:40 p.m. the following proceedings are had:)

The Court: You may call your next witness.

Mr. Nesbett: Mr. Kenneth Shipley.

KENNETH SHIPLEY

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Nesbett:

Q. State your full name, Mr. Shipley.

A. Kenneth Wrigley Shipley. [42]

Deputy Clerk: What is the middle initial?

A. Wrigley.

Deputy Clerk: Shipley? A. Yes.

Mr. Renfrew: What is the last name?

Mr. Nesbett: Shipley. S-h-i-p-l-e-y.

Q. What is your business, Mr. Shipley?

A. Primarily fishing.

Q. You know Mr. Polimeni?

A. I have known Mr. Polimeni since 1938.

Q. Where did you meet him?

A. At South Naknek, Alaska.

Q. Have you had occasion to work for Tony Polimeni after you met him?

A. Yes. I worked for him lots of times.

Q. I will ask you if you helped him on the building? A. I started that myself.

Q. What did you do?

A. Worked on the basement and went up with the work.

Q. What did you do with the basement?

A. We have a full basement. It is a thirty by thirty basement. We had a 34 foot well. It was all cased and lined and later the well was sunk down to 60 feet.

(Testimony of Kenneth Shipley.)

Q. Who did that work?

A. Some of the boys working around South Naknek. [43]

Q. Were they employed by Tony?

Mr. Renfrew: I object to the questions unless the witness knows by his own knowledge.

The Court: I think they are in order.

Mr. Renfrew: Very well, your Honor.

Q. I asked what you did in the basement. Would you state what was done there.

A. The basement was lined with redwood planks.

Q. What size planks?

A. It comes about three by twelve.

Q. Did you do that work? A. Yes.

Q. What else was done in the basement?

A. First the well and lined that up.

Q. What other work did you do for Mr. Polimeni?

A. Well, wait a minute. The question is wrong there because I was working for Bill Regan to start the building.

Q. That is when you built the basement. Is that right? A. Right.

Q. After you commenced working for Mr. Polimeni what did you do on that building? What was your first job?

A. I didn't work for him so much after that. He used another—a carpenter.

Q. Didn't you assist Mr. Polimeni in fixing this building up? [44] A. Yes.

Q. What did you do?

(Testimony of Kenneth Shipley.)

A. Well, we started out first with the basement.

Q. What did you do in the nature of completion of the basement?

A. Well, put in the stairs and all—just odds and ends of work that you do to fix any building.

Q. Did you construct a stairway from the basement up to the first floor? A. Yes.

Q. What else did you do?

A. Well, it is pretty hard to say.

Q. Well, did you do any insulation work on the building?

A. The building was sealed with Masonite and then on top of the Masonite came the plyboard.

Q. Was the first floor done that way?

A. Yes.

Q. The first floor?

A. The first floor was a double floor laid two by twelves. They figured on dancing there and the timbers they put in there was twelve by twelve.

Q. Was a double floor put on the first floor by Mr. Polimeni?

A. No, that was the original floor of the building.

Q. How many rooms were there on the first floor? [45]

A. There was four.

Q. Were all of those rooms constructed as you stated previously with Masonite and plyboard?

A. Yes.

(Testimony of Kenneth Shipley.)

Q. Was there any other work done on those four rooms by you or Mr. Polimeni while you were there? A. Did I install——

(Interruption)

Mr. Renfrew: Just a moment. Now, your Honor, the question has been asked of the witness.

(Interruption.)

A. What I was trying to figure out was where my work stopped and the other boys took over, because about that time I got a winter maintenance job with the cannery and after that well then the reason I know about the material is I had to check it out of the cannery and haul it up myself.

Q. What materials were used?

A. Plyboard and Masonite and all this furring and most everything—most everything you use to build a house.

Q. What was done on the second floor?

A. Mr. Polimeni hired a couple of carpenters to complete the second floor. That was cut up into five rooms. That was Masonite and plyboard on the walls and plyboard on the partition walls.

Q. You know whether or not Mr. Polimeni furnished those rooms [46] after that was completed?

A. I was in a couple of them. A friend of mine was staying there. There was a bed and dresser and what not.

Q. Each room?

A. The ones I was in. They was divided. A lot of material that was supposed to be used that was stored in a couple of the rooms.

(Testimony of Kenneth Shipley.)

Q. You know whether or not there was material stored in the basement?

A. I cannot say positively. That was hearsay. I know he was going to get that imitation paper, or imitation brick for the outside walls, but I never saw it, but that can be checked by the cannery records very easily.

Q. You still live at Naknek, Mr. Shipley?

A. Yes.

Q. Have you lived there all this time?

A. No, I was outside. I went back home.

Q. When did you last work for Mr. Polimeni on this building? A. That would be '48.

Q. 1948. What month?

A. That would be just before it opened.

Q. Just before it opened?

A. Yes, because I was working a gang down there and I used to bring boys up there to feed and Tony was feeding the cannery gang that I had working that spring. [47]

Q. Would you say you quit working for him in May? A. Before I left.

Q. In April? A. Yes.

Q. How long had you worked for him prior to that?

A. Off and on you might say for three or four years. I would work a few days or so when he needed me, or when I was available for the job.

Q. I believe you testified, did you not, that you met Tony in 1938 for the first time?

A. 1938, yes, sir.

(Testimony of Kenneth Shipley.)

Q. You were living in the Bristol Bay Area at that time? A. Yes.

Q. In South Naknek or North Naknek?

A. Yes.

Q. South Naknek?

A. Yes, in 1939 I bought my own home there.

Q. Are you familiar with property values in South Naknek at that time? A. Yes.

Q. Would you state your idea of the value of the building along about the time you quit work for him?

A. I imagine from what I saw it would take between eight and ten thousand dollars to duplicate that building.

Q. For just the building? [48]

A. Yes, with the material that went into it.

Q. Are you able to estimate the value of the fixtures in the building less the value of the merchandise?

A. Well, I never saw any bills on the finances and all that. It is not for me to say.

Mr. Nesbett: I believe that is all, Your Honor.

Cross-Examination

By Mr. Renfrew:

Q. Mr. Shipley, you stated you worked various times over period of years for Mr. Polimeni?

A. Yes.

Q. Was all that work confined to this building, or did you do other work not on the building?

A. Well, when he was tearing down that old building, being a representative of the company, I

(Testimony of Kenneth Shipley.)

don't loan any trucks out. I did all the work myself. The same with the cat. I would take the cat or the truck and go ahead.

The same with the cat. I would take the cat or the truck and go ahead.

Q. Outside of the time when you were working for the company I am asking whether you during that two or three year period of what interval you worked did you work on this building or did you do other work for him?

A. No. Most of my work consisted of around that building.

Q. Then I take it you were working on that building for [49] three or four years.

A. I was.

Q. But a part of the time you were working for Mr. Regan, the owner of that building.

A. To start with I was working for Regan.

Q. When did Mr. Regan pass away, do you know? A. Forty-six I think it was.

Q. Prior to that date did Mr. Polimeni claim any interest in that building. A. No.

Q. Then you couldn't have been working for him for two years, could you, because if Mr. Regan passed away in forty-six and Polimeni didn't claim anything there until he passed away that would have been it? A. Two years?

Q. All I want are the true facts of the situation, Mr. Shipley. In the aggregate how many days do you suppose you were employed by Mr. Polimeni on that building?

(Testimony of Kenneth Shipley.)

A. Well, to be frank with you, I couldn't say. I would have to check up on the books.

Q. Would you give us just a rough estimate as to whether it would be ten days, or two months, or twelve months?

A. I didn't make any statement. Lots of time I worked for Tony when I was working for the company, and that wouldn't be on record. [50]

Q. You mean you were getting pay checks from two outfits? A. Yes.

By the Court: If you remember——

A. To be frank with you, I cannot tell you exactly how much money I did make from Tony.

Q. Would you make an estimate. You know whether it was a thousand dollars, or two hundred dollars, or three hundred dollars, don't you?

A. Call it three hundred dollars.

Q. Would you state that it could be five hundred dollars and could be two hundred dollars?

A. Three hundred dollars would be a very fair figure, I would say.

Q. That would be all the work that you did for him over the entire time, the two years?

A. Yes.

Q. As I understand your testimony, Mr. Shipley, you were in charge of some portion of the cannery, so that what Mr. Polimeni purchased had to be checked out through you, say this ship lap and Masonite and some other building materials?

A. Yes.

Q. I will ask you if when it was checked out

(Testimony of Kenneth Shipley.)

through you an invoice was made for that purchase was it not?

A. That was made by the storekeeper.

Q. There was an invoice. That is a permanent record? [51]

A. Oh, yes.

Q. So that we could easily determine from those records what Mr. Polimeni did buy?

A. Yes, sir.

Q. Do you happen to have them?

A. As I stated, I came in from outside and I didn't know anything about this case until I got here to Anchorage.

Mr. Renfrew: Right. Thank you Mr. Shipley.

Re-Direct Examination

By Mr. Nesbett:

Q. Mr. Shipley, Tony did pay you for that work?

A. Yes. Tony don't owe me a thing.

Q. Tony paid the other carpenters around there too, didn't he.

Mr. Renfrew: Object to that. It is not proper re-direct.

The Court: Unless you consider it vital to your case, and ask for permission to ask this particular question, objection will have to be sustained.

Q. At the time you were working for Tony and also at the cannery were you employed as the winter man? A. Yes.

Q. Your duties in that line are not definitely defined except to keep track—— [52]

(Testimony of Kenneth Shipley.)

Mr. Renfrew: Objected to——

The Court: Will you repeat that, please.

Mr. Nesbett: I will rephrase it, Your Honor.

Q. What were your duties as winter man?

A. The winter man takes care of the cannery and puts it away for the winter and maintains the light plant. The light plant goes on at 4 o'clock in the afternoon and off at midnight, and you pump oil and everything else, just like any other city. It is just like a little city.

Mr. Nesbett: No further questions.

Mr. Renfrew: We have nothing further.

Mr. Nesbett: That is all, Mr. Shipley.

Call Mr. Albert Ruhl.

ALBERT RUHL

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Nesbett:

Q. Is Albert Ruhl your full name?

A. Albert Henry Ruhl.

Deputy Clerk: Henry? A. Yes.

Deputy Clerk: R-u-h-l? A. Yes. [53]

Q. Where do you reside?

A. At the present time North Naknek.

Q. How long? A. Six years.

Q. Have you ever lived in South Naknek?

A. Yes, I have lived in South Naknek.

Q. When did you live there?

A. Up until August of 1948.

(Testimony of Albert Ruhl.)

Q. You know Mr. Polimeni, the plaintiff in this case?

A. Yes.

Q. How long?

A. I have known Tony since 1944.

Q. Are you familiar with the restaurant and cocktail bar that Tony owned at South Naknek?

A. Yes, I am.

Q. Did you have occasion to work on that building for Tony?

A. Yes in the spring of forty-eight I helped him get the place ready for operation.

Q. Had you worked on that building previously?

A. No.

Q. Do you recall when you went to work in the spring of forty-eight?

A. I came back from the States the 2nd day of February. I was hospitalized and I started immediately working for Tony when I came back. [54]

Q. That would be what date?

A. About the 4th or 5th of February.

Q. Were you with Tony in South Naknek right up until the time the building burned?

A. Yes, I was.

Q. Can you describe to the Court and jury briefly the type of construction used in that building?

A. Well, I didn't have so much to do with the construction work, the carpenter work. He had that done in the summer time. I was also a winter man in the cannery. I know he had four carpenters awhile, and also one working all summer.

(Testimony of Albert Ruhl.)

Q. You know that of your own knowledge?

A. Yes.

Q. You were there frequently?

A. I was living there.

Q. In the building? A. Yes.

Q. Then state what was done there, even if you didn't do it.

A. He used mostly all new lumber. He did buy an old house from Regan, but the place was torn down with a cat and torn up and very little he could use. He built a large windbreak on the back. I think that windbreak was about eighteen feet long and seven or eight feet wide, and a windbreak on the front. He put all new windows up stairs. Tore the roof off the place and put in gables on the roof in order to build rooms up stairs. [55]

Q. What do you mean?

A. The roof was a pitched roof and I had to tear it off and raise it up in order to put windows in the rooms.

Q. Go ahead.

A. That was all insulated up there and plywooded and finished off and all doors and new locks on the doors. I put the locks on myself, all Yale locks. I redug the well. It was thirty-four feet and I dug it down to sixty feet, cased it and installed the pumping equipment.

Q. What kind of pumping equipment?

A. He had an automatic electric pump, push rod type pump.

Q. You know what it cost Tony to improve that well?

(Testimony of Albert Ruhl.)

A. I don't know the exact cost, but I dug the well. I imagine it must have cost for that thirty some odd feet I dug—must have cost him eight or ten dollars a foot.

Q. That is rather high, isn't it?

A. Not when you dug it by hand and the house was right there and the dirt had to be carried out in buckets.

Q. What kind of casing was used in the well?

A. Two by twelve casing.

Q. What else do you know about the construction of that building?

A. I know that he done more work on the basement, that he enlarged the basement a little. He built an outside entrance and also an inside entrance with steps, changed the windows around. [56] The whole place was almost rebuilt from its original—

Q. How much did you receive a day when you worked on the well?

A. I never worked for an actual wage for Tony. There was a deal—I was a cannery man. I came back from the hospital and was paid as a cannery man, but didn't have any job. In fact my house was occupied, and in order to be doing something I worked for Tony, but he did pay me something. I don't remember.

Q. Didn't you tell me he did pay you ten dollars a day for the well work?

A. I didn't say—that is about what he paid others.

(Testimony of Albert Ruhl.)

Q. Are you familiar with property values in South Naknek?

A. Yes.

Q. Based on your familiarity with other property in South Naknek, what was the value of Tony's building alone as of June, 1948, as of the time it burned?

A. I have a building of my own there that I value at five thousand dollars and it is not nearly as good, or as large a building as Tony's, and I believe his building to be worth ten thousand dollars at a minimum. I don't believe it could be replaced for that.

Q. You were in the building in July?

A. Until we went fishing, the 25th of June.

Q. What would you think it would cost to replace that building [57] in South Naknek?

A. I believe ten thousand dollars.

Q. Could you estimate the value of the equipment—stove—electric light plant, and the equipment he had? You operated it, did you not?

A. Yes. Not counting his provisions?

Q. Not counting provisions.

A. I think you could easily say worth two thousand dollars or twenty-five hundred.

Q. For equipment? A. Yes.

Q. Mr. Ruhl, approximately what date did you close that restaurant down?

A. I closed the restaurant down I think around the 23rd of June.

(Testimony of Albert Ruhl.)

Q. Was it operated to your knowledge after that date?

A. No, it wasn't. It was locked up and I had the keys. Tony didn't even have any keys.

Q. Do you know anything about this inventory?

A. Yes, there was between seventy-five and a hundred cases, including cases of canned milk. Bacon—ham.

Q. Can you look at this? By looking at that provisions list would your memory be refreshed so you could testify on any of the given items, Mr. Ruhl?

A. Yes. He had all these things, I believe, that is here. [58]

Q. Do you mean he had exactly every can that is listed there?

A. I don't know that. I never counted them up can by can, or case by case, but at different times I did more or less take a rough inventory of his food stuff downstairs. At the time he was feeding the men I more or less cooked for him. He was a little pressed for help. He was feeding twenty-five men and that came over night.

Q. During the time he fed these men he replenished his inventory from time to time, or did you know?

A. Yes, he was replacing all the time, in fact he bought to excess in lots of cases.

Q. You know how that happened, why he did it?

A. I think he was trying to build up his stock all the time and he had unlimited credit there. He was feeding twenty-five men a day at five dollars apiece, so his credit was very unlimited.

(Testimony of Albert Ruhl.)

Q. Did you and Tony go off fishing together?

A. Tony fished about two weeks before I did.

Q. You know why he closed the place down and went fishing himself?

A. Yes. At that time the canneries had opened up and the restaurant business wasn't too good. I operate a restaurant myself. It is easy for a man just to go to the cannery and eat and he don't have to pay for his meals and he also has a beer dispensing license and at that time I believe the season [59] was closed. For sixty days during the fishing season I believe the license is revoked so he couldn't sell beer either, and it paid him to close up and go fish.

Q. Will you look on the bottom of that bill of particulars, where it says chairs and six tables and so forth. Can you state whether or not all that equipment was in the building when you closed it down? A. Yes, it was all there.

Q. It was all in the building? A. Yes, sir.

Q. Look at the valuations on that page. Do you consider them nearly correct?

A. I believe he has it very low. I bought a bed over there this winter for myself, a double bed, for a hundred dollars. He has one listed here at eighty dollars. I wish I could have bought one like that.

Q. Did you have occasion to check this building after you closed it down from time to time?

A. Yes, I did.

Q. Was that on Tony's behalf?

A. I was looking after it for Tony and I came in on Saturday and on closed periods and I always

(Testimony of Albert Ruhl.)

made it a purpose to go to the restaurant and look it over. I think I came in the third time and it had burned down, the third or fourth time. I think I had been in three or four times. [60]

Q. Was the oil range shut off?

A. Yes, there was no oil in the stove. It had burned itself dry.

Q. When did that happen?

A. While I was still there. After I had closed down.

Q. Did anybody else live there? A. No.

Q. No one lived there after that?

A. Nobody.

Q. Did you see the building after it burned?

A. Yes, I did.

Q. You remember the date that it burned roughly?

A. I understood awhile ago the 20th, but I didn't believe it was that late, but I am not sure. The fishing season started the 25th of June and I think it was in the second week of fishing that the place burned, but that would put it around the 9th or 10th, somewhere around there.

Q. Well, when you examined the premises after you returned during the closed season what did you observe? A. What did I observe?

Q. What did you see when you went back to the place where the restaurant was?

A. When I went there I saw it had been——
The Court: You might as well ask if it was.

Q. Was anything left? [61]

(Testimony of Albert Ruhl.)

A. No. It was burned to the ground.

Q. Anything salvaged? A. No, nothing.

Q. There was a power house next to the building?

A. Yes.

Q. Was that burned? A. No, it was not.

Q. Was the privy burned?

A. No, it was not.

Q. You know what happened to that power house? A. No.

Q. How big was it?

A. A building about eight foot square, I believe.

Q. What type construction?

A. It was very well built, built for an engine house. It was Celotex and also plyboard with rustic sheathing on the outside.

Q. Look at the total of the provision list, Mr. Ruhl, and state whether or not that appears to be a fair estimate of the value of those provisions?

A. I would say it was a fair estimate.

Q. You have looked that list over before, haven't you? A. Yes, I saw that list before.

Mr. Nesbett: No other questions, Your Honor.

ALBERT RUHL

testifies as follows on

Cross-Examination

By Mr. Renfrew:

Q. Mr. Ruhl, there are a few questions I would like to clear up. You spoke of this little house

(Testimony of Albert Ruhl.)

eight by eight and described how it was constructed. Was the light plant housed in that building?

A. No, it had never been in there.

Q. The light plant had never been in there?

A. No.

Q. Were you working for Polimeni on the 17th of April? A. Yes, sir.

Q. You know that the light plant was not there at that time? A. Yes, sir.

Q. Where was it at the time of the fire?

A. On the windbreak—back porch windbreak.

Q. Was it completely destroyed?

A. Yes, sir.

Q. What became of it?

A. Last I saw it was laying there in a bunch of tin and ashes.

Q. Were you in the immediate vicinity of the fire the day of the fire?

A. No, I was out on the fishing grounds in the boat. [63]

Q. What arrangements did you have with Mr. Polimeni to operate that place?

A. We hadn't really got to an agreement yet, although we had talked a time or two about going in together after the season, but it had never been settled.

Q. I understood your testimony to be that Mr. Polimeni left there sometime prior to the 23rd of June, when you closed it up? A. Yes.

Q. Prior to that when did he leave there?

A. I couldn't say exactly. I think the fishing

(Testimony of Albert Ruhl.)

season starts the 25th of June and I think he left about two weeks before that, so that would be the 10th or 15th of June.

Q. So you operated this place about ten days or two weeks when he wasn't there? A. Yes, sir.

Q. There has been some testimony here that a man by the name of Hansen was also with you?

A. It was Mrs. Hansen. She worked as a waitress for Tony during the time he was feeding the gang, but she wasn't there. At that time she was working at the Alaska Cannery.

Q. She wasn't working there during Mr. Poli-meni's absence? A. No.

Q. You were the only one in it? [64]

A. Yes.

Q. What arrangement did you have for the two weeks?

A. We didn't have any arrangement.

Q. What happened to the money you took in?

A. I had about a hundred and fifty dollars of the money, and there was quite a bit of money there, quarters, half dollars and also checks, private checks people had written him that I had in a can. It didn't amount to very much. I don't know, might have amounted to a couple hundred dollars, but I wouldn't say for sure, because I don't know.

Q. Do I understand you, if somebody came in and wanted something you sold it and put the money in the can, and when you left you left the money?

A. No. I did take the money, but didn't take the silver.

Q. I didn't understand.

(Testimony of Albert Ruhl.)

A. I did take the paper money. I think it was about a hundred and fifty dollars, but I didn't take the silver or the private checks people had written.

Q. You had no understanding with Polimeni as to how you would run the place, or anything?

A. No, Tony trusted me, and I was more or less helping him get started.

Q. You glance over this inventory and state you have seen it before and you think that was about what he had there? A. Yes.

Q. And you also testified that during your acquaintance [65] with him from time to time he did augment this inventory by using up credit he had with the cannery people—he had there in town, isn't that right? A. Yes, sir.

Q. Do you know that they kept track of the goods that they sold him?

A. I don't know that. I do know that I figured up what he had coming for feeding these men one time, and it come to right close to four thousand dollars and that wasn't enough to cover his bill for supplies. I think he was still in debt about two thousand dollars.

Q. That would include all the provisions you used up? A. Not all used up.

Q. Did you ever see any of the invoices they sold him? A. Yes.

Q. Do you have any idea as to how this inventory that you say that you examined before was made up? A. This one here?

Q. Yes. A. No, sir, I don't.

(Testimony of Albert Ruhl.)

Q. Was it checked with the inventory, or so far as you know a guess? A. That I don't know.

Q. I understood you to mention something about hams and bacon, or did I misunderstand you? [66]

A. Yes, sir.

Q. Were there any? A. Yes.

Q. I don't mean in cans. Were there hams and bacon, raw meats? A. Yes, by the case.

Q. You know where they were purchased?

A. I believe they were purchased at Alaska Packers, although I wouldn't swear to that, I don't know.

Q. You are not positive? A. No.

Q. I notice on this inventory it says ham canned, fifty-nine cases. That is not what we were talking about? A. How is that?

Q. Here on this inventory it says ham canned, fifty-nine cases. That isn't the type of ham we are talking about is it? Canned ham?

A. No, he did have canned hams and I know that.

Q. That isn't what you referred to?

A. No. I think I did mention canned ham.

Q. It was ham and that wasn't canned?

A. Yes.

Q. How many hams there roughly hanging up in the basement, wasn't it?

A. Hanging up and some still in the cases. [67]

Q. I don't notice any of that on the inventory. Quite a bit of it, wasn't there?

A. Smoked ham?

Q. Yes.

(Testimony of Albert Ruhl.)

A. Quite a bit.

Q. Were you a watchman for the cannery that winter?

A. I had been that winter, but had been out. Had broken my arm.

Q. You had charge of the cannery in March?

A. Alaska Packers.

Q. Who was it? You know? A. Yes.

Q. What is his name? A. Stanley Roher.

Q. Do you know whether or not he is in the country? A. No, he is not in the country now.

Q. You went into some detail, Mr. Ruhl, about the well. Was the well burned?

A. No, I don't think the well was burned. It was in the basement. It was cased over on top, but it wasn't usable I don't believe.

Q. Did you ever look in the well afterwards?

A. Yes.

Q. Was the casing alright?

A. The top part was burned off. [68]

Q. Just the top, but the sixty feet in the well was alright? A. Yes.

Q. Do I understand that the work you did in the building was sometime between the 4th and 5th of February, 1948, and until it was opened in March?

A. Yes, sir.

Q. And did you have any kind of arrangement with Mr. Polimeni for your services at that time, or was that the same deal you had when you ran it for the ten days or two weeks when he wasn't there?

A. No, I didn't have any special agreement there.

(Testimony of Albert Ruhl.)

At different times I offered to do the work to help Tony get started, but different times he gave me fifty dollars and I ate and slept there.

Q. You mentioned you have a restaurant now. You didn't have it at that time I take it?

A. I bought it in August, 1948, after fishing season.

Q. Do you have any idea how this fire started?

A. No, sir. I do not.

Q. Do you know what portion it started in?

A. No, sir. I heard it was in the front and in the back. I don't know.

Q. Do you know of anyone that was there or could say whether or not there was any attempt made to extinguish it?

A. Yes, there was several people there. [69]

Q. They are there now?

A. Yes, Womper, Jones, Hansen. Yes, there was a man—no, he is not there now. This school teacher.

Q. Is that school teacher there now?

A. Yes.

Q. Do you know anything about the letters Mr. Polimeni had written in connection with an application for an insurance policy?

A. I know some about them. I was the one that measured up the place, how far from the school and how far from the postoffice.

Q. You know who wrote the letters?

A. A school teacher wrote them. I helped her to word them.

(Testimony of Albert Ruhl.)

Q. You know Bill Smith? A. Yes, sir.

Q. You heard his testimony this morning?

A. Yes.

Q. You also helped to write them?

A. I helped to word them.

Q. The school teacher did the actual penmanship? A. Yes.

Q. And Smith worked them over?

A. I don't know.

Q. You heard him testify?

A. I thought he testified he gave some advice about it. [70]

Q. Did anyone else have anything to do with the writing of these letters?

A. Not to my knowledge.

Q. Were you there when the letter counselor referred to as the June 4th letter to Tony, stating they hadn't received any information and had no information, was received?

A. I believe I remember it.

Q. Did you discuss that with Mr. Polimeni?

A. I believe I did.

Q. What did you recommend to him at that time, if anything?

A. I don't remember at that time what I did recommend to him.

Q. Do you remember that shortly after the 4th of June that he did receive a letter stating they did not have the information so that they could place the insurance, and until they got that information they couldn't place it?

(Testimony of Albert Ruhl.)

A. It seems to me there was something about writing him and finding out what information they wanted. I don't know.

Q. Did you after the receipt of that letter do anything like you did previously? That is go to the school teacher and ask her to pen a letter in reply?

A. I don't believe I did at that time.

Q. How did it happen, Mr. Ruhl, that a school teacher was asked to write the letter? They were done not on a typewriter, but in longhand?

A. Yes. At that time I was not able to write very good. I [71] had had my arm broken and she is a good penman.

Q. Was it your right arm? A. Yes.

Q. How did you dig that well?

A. It doesn't bother me to work with it.

Q. It doesn't bother you to dig, but you couldn't write?

A. I can dig, but it isn't easy for me even today to write.

Mr. Renfrew: That is all.

Redirect Examination

By Mr. Nesbett:

Q. May I have just a moment or so?

The Court: Yes.

Q. Showing the witness Exhibit No. 4 of defendant's answer. Do you recall that letter, Mr. Ruhl?

(Testimony of Albert Ruhl.)

A. I don't remember this letter. No, I don't believe I had anything to do with that.

Q. Showing you Exhibit 5.

Mr. Renfrew: Just a moment. So that I can identify these for the purpose of cross-examination when you refer to Exhibit 4 that is the letter of June 1, 1948?

Mr. Nesbett: Exhibit 4 of defendant's answer.

Mr. Renfrew: All I have is a copy.

Mr. Nesbett: It is your answer. It is Exhibit 4 and the letter of June 4th. [72]

Mr. Renfrew: Four is his answer. It was June 1st.

Q. Now, referring to Exhibit 5. Did you see that letter?

A. Yes sir. I have seen this letter.

Q. When you got the letter did you discuss it with Tony?

A. Yes, that is the time I measured how far from the school house, how far from the postoffice and its location there.

Mr. Renfrew: Did I understand his answer to be that was the time that he made the measurements.

Q. Yes and you refer now to the June 4th letter. Yes. Now look at Exhibit 3 and state whether or not you were not confused in your last answer?

A. Yes sir. I helped take up this letter too with the school teacher.

Q. That was done sometime before April 17th?

A. Yes sir.

(Testimony of Albert Ruhl.)

Q. You made those measurements?

A. Yes sir.

Q. Did you go out and measure some more after you received this letter of June 4th, which is Exhibit 5, where it says apparently you didn't receive my letter of April 9th?

A. How was that question again?

Q. I say when you received the letter of June 4th did you go out and take any other measurements?

A. That was the only time there was any measurements made, [73] I believe.

Q. What did you do when you received that letter of June 4th?

A. I went out and measured the building and got the distance between the building and the school house. I think Tony went to the school teacher and——

Mr. Renfrew: Object as hearsay.

Q. If you know?

A. I don't know. I gave him the distances.

Q. Have you ever seen this letter of July 23rd?

A. Yes. I seen that.

Q. Did it arrive in the mail on or about July 23rd?

A. I forget the exact date, but I believe it was after the place burned down.

Q. That you received the letter.

A. That I saw the letter, because Tony was gone.

Q. Did you open his mail?

(Testimony of Albert Ruhl.)

A. No sir. I did not.

Mr. Nesbett: That is all.

Recross-Examination

By Mr. Renfrew:

Q. Again the letter of June 4th. It starts out "We are in receipt of your letter of June 1st." Do you have that before you now?

A. Yes sir. [74]

Q. Now, did I understand you to testify that you had seen that letter and that after you saw it you went out and made some further measurements and told Tony about them? Is that correct?

A. I am not sure about that. I know I went out, but I am not sure this is the letter. After I found out they had to have measurements I went out and measured it.

Q. Mr. Nesbett pointed out to you that you obviously did that prior to the letter of April 17th. Then I asked you when you got this letter, or did you?

A. I believe I did it after I got this letter, because I don't believe—I don't know.

Q. Go back two pages and look at the letter of April 17th. That would be Exhibit 3. It starts out, "Having received your reply to my inquiry concerning my insurance." You have that letter before you?

A. Yes.

Q. Now, did somebody furnish a lot of dimensions and distances?

(Testimony of Albert Ruhl.)

A. Evidently there must be a letter notifying us they had to have that before this time.

Q. Evidently that is correct. Now, you furnished the information about which that letter was written on April 17th? A. Yes.

Q. Now, I ask you to go back to the letter of June 4th and ask [75] what you did after that?

A. I don't think I did anything about it. I think I was mistaken about this letter.

Q. You remember ever seeing that letter of June 4th?

A. Yes, I have seen that letter before.

Q. Alright. Now you are positive of that, because that letter states in effect that they hadn't received the information contained in the letter of April 17th, doesn't it? A. Yes.

Q. What did you do when you got that letter stating that they had not received the information which you sent them under date of April 17th?

A. I didn't do anything, didn't do anything about it.

Q. Were you in the capacity at that time of advising Mr. Polimeni as you were on April 17th, when you took him to the school teacher?

A. I think he must have had the information already and I didn't go out and measure it again.

Q. Is it your information that you got the letter of June 4th but couldn't recall that you gave him any advice at all? A. I don't know that I did.

Q. I will ask you if Tony can read that letter? Can he read the English language?

(Testimony of Albert Ruhl.)

A. I think he can.

Q. As long as you were around he got mail from other people? [76] A. Yes.

Q. Did he read it himself?

A. He read it himself, but sometimes he cannot.

Q. You remember having any conversation with him about the letter of June 4th, about coaching him as to the distances and so forth?

A. I remember reading the letter there alright, but I don't remember doing anything about it.

Q. You don't remember discussing it with Mr. Polimeni at all?

A. Yes. We discussed it, but I don't remember what was said at that time.

Mr. Renfrew: I guess that is all.

Further Redirect Examination

By Mr. Nesbett:

Q. Mr. Ruhl, look at the letter of April 9th and see if you are not confusing it with the letter of June 4th. The letter of June 4th quotes the letter of June 9th?

A. Well, I believe that I could be. It sort of had me confused awhile ago. I believe that might be the letter I referred to.

Q. After the letter of April 9th you went out and made measurements? A. Yes. [77]

Q. Then look at the letter of April 17th.

A. Yes.

(Testimony of Albert Ruhl.)

Q. That is the letter containing the measurements? A. Yes.

Q. You made those measurements yourself?

A. Yes.

Q. Now look at the letter of June 4th. That is identical with the letter of April 9th, except the first paragraph. You want to add anything to your testimony?

A. I believe I am mistaken. I believe I was confused with the letter of April 9th.

Q. Then is it your testimony that you never saw the letter of June 4th?

A. I believe not. I believe I have that confused with the letter of April 9th.

Further Recross-Examination

By Mr. Renfrew:

Q. Did you not testify a few moments ago that you were aware of the advice to Mr. Polimeni which in effect told him we have not received the information we requested and you will have to furnish us this information before we can give you any insurance?

A. I don't recall of ever talking to him about anything like that. [78]

Q. You don't remember?

A. That is right. I can't remember talking it over with him about this letter.

Q. At that time weren't you contemplating a partnership with Tony?

(Testimony of Albert Ruhl.)

A. Yes, we had talked it over more or less, having a working arrangement with him after the season——

Q. You were pretty interested in the insurance?

A. I would only have a working interest in it.

Q. Yes, but you were urging him to buy the insurance.

A. I was interested in it and trying to help him.

Q. That is right. Now look at Exhibit 4, the letter of June 1st. Didn't you tell him that you better write and see why you don't get the insurance?

A. Yes, but I don't know whether he did go to the school teacher or not.

Q. You remember the incident and saying he better write in and see why he didn't get any insurance? A. We talked about it.

Q. You did talk about that?

A. We talked about why he didn't have the insurance.

Q. Did you ask him why he didn't get it?

A. No.

Mr. Renfrew: That is all.

Mr. Nesbett: May I ask one more question? [79]

Further Redirect Examination

By Mr. Nesbett:

Q. Look at the letter of June 1st. What does that say?

A. I have written you before concerning insur-

(Testimony of Albert Ruhl.)

ance for my restaurant and received no reply. I didn't have anything to do with this letter either.

Q. Wasn't that the letter you were just testifying about?

A. I don't remember whether I told him to write or not.

Q. You don't remember whether it was the letter of June 1st or June 9th, or whether it was just a discussion you had about it? A. No sir.

Mr. Nesbett: No further questions. Call Mr. Coffey.

The Court: Unless he is a short witness.

Mr. Nesbett: In so far as we are concerned he will be. I have about three questions.

EDWARD D. COFFEY

being called as a witness on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Nesbett:

Q. Your name is Edward D. Coffey?

A. Yes. [80]

Q. You are an insurance agent and broker in Anchorage? A. Yes.

Q. You were so engaged in March, April, May, June and July of 1948, were you not? A. Yes.

Q. State what companies you represent and in what capacity?

Mr. Renfrew: This is incompetent, irrelevant and immaterial.

(Testimony of Edward D. Coffey.)

The Court: I don't see the materiality of it. How do you claim it is material.

Mr. Nesbett: I just want to know that he does represent some as agents and some as brokers. Some question of authority of a broker or agent may come up and I would like to have that information.

Mr. Renfrew: He has just testified he is an agent and a broker.

The Court: I think the objection is well taken in view of the fact no insurance company was involved. It would be immaterial what companies he writes insurance with.

Mr. Nesbett: Since we have (Inaudible) on a tort contract.

The Court: You say you have what?

Mr. Nesbett: You say Your Honor takes that view?

The Court: You said something before that.

Mr. Nesbett: On one cause of action we are [81] suing on breach of contract. The question I thought might arise was whether or not Mr. Coffey could have written a policy based on the information received in the letter of April 17th. As an agent it is our theory he could have, as a broker I don't know. So far as tort is concerned it makes no difference.

Mr. Renfrew: Your Honor, what difference does it make the names of the companies he represents? Counsel is going far afield. He could ask could you

(Testimony of Edward D. Coffey.)

have written this insurance, or did you, but not the name of the company.

The Court: I don't see how it would be relevant—the name of the company.

Mr. Nesbett: Could I ask this question, "How many companies does he represent as agents and brokers?"

The Court: As an insurance man it is permitted——

Mr. Renfrew: Your Honor, whether it is three or thirty three how is it material whether this man is an insurance agent for thirty five years or thirty five days. He is sued on two counts. It don't make a particle of difference——

The Court: As a matter of fact, his experience, or his testimony could always be applied in the light of his experience, but when you mention tort. That don't seem to me to be the case here. This is set up in two ways, one by non-performance, or breach, and the other by negligence.

Mr. Renfrew: The negligence, Your Honor, [82] is counsel's theory of the tort.

The Court: But the negligence would not exist without the contract.

Mr. Renfrew: That is what the cases held, but not their theory.

Mr. Nesbett: I have my theory of it too and cases that might be favorable to me.

The Court: I think the Court would be interested in hearing your theory, because the theory I get

(Testimony of Edward D. Coffey.)

from the pleadings is that both are predicated on an equitable contract, but I don't see how there could be any negligence predicated on anything except the theory of a contract.

Mr. Nesbett: Your Honor, if you don't consider it material whether or not he had authority to issue a policy based on the letter of April 17th I won't go into it any farther.

The Court: I don't think I held anything of the kind.

Mr. Nesbett: I couldn't find out which companies he had the right to issue a policy for and which he did not.

Mr. Renfrew: How could you find out whether he had authority to issue a policy?

The Court: I don't see where proof of that kind would serve any purpose here. If he had authority to issue [83] the policy it wouldn't make any difference through which company he could have issued the policy.

Mr. Nesbett: Could I ask how many he represented as agent and how many as brokers?

The Court: You may.

A. As a matter of fact I couldn't tell you off hand without checking to see. I represent one company as general agent.

Q. One company as general agent?

A. Yes.

Q. As a broker you know roughly how many you represent, Mr. Coffey?

A. I will qualify my answer after I gave the

(Testimony of Edward D. Coffey.)

answer. We probably represent in the office, I would say, fifteen companies, and qualifying that we represent them with certain restrictions as to certain risks that they assume, or that they would care for us to write and on which we have specific instructions from them.

Q. You represent those fifteen companies as brokers? A. As agents.

Q. And you represent any solely as brokers?

The Court: I think that may be confusing. If he is a broker he does not represent them.

Mr. Nesbett: If he represents them——

The Court: Then he would be their agent. He could just deal with them as a broker. [84]

Mr. Nesbett: Maybe he does that.

The Court: Representing a company, it seems to me, implies agency.

Mr. Renfrew: I think what counsel is trying to get at is whether or not he has binding authority.

Mr. Nesbett: I mean as a broker.

A. Placing it.

Mr. Nesbett: Placing it with a company, any one of several companies.

The Court: You may go ahead and ask.

Q. How many do you represent as broker?

A. I call to mind just one.

Q. One more question.

A. Pardon me. I will qualify that, if I may. A broker and an agent is a fine distinction so far as their brokering business and consummation—I mean brokering business, and for the final consum-

(Testimony of Edward D. Coffey.)

mation the ordinary broker would not have a license to represent any company. The agent would under certain restrictions.

Q. One more question.

The Court: You said only three questions and it is five o'clock now.

Q. This one.

The Court: One more and that is all.

Q. Were you in Anchorage between March 30th, 1948, and July [85] 23rd?

A. I believe I have a letter in my correspondence where I probably returned to Anchorage in the middle of April and again I went out and I don't know when I returned. Yes, I was here about a week and went out again. I will furnish that tomorrow, if I can.

The Court: Ladies and Gentlemen, we are about to adjourn. You will bear in mind the admonition I have previously given you and be in Court tomorrow morning at 10 o'clock.

(Whereupon Court adjourns until 10 o'clock a.m., April 18, 1950.) [86]

April 18, 1950, 10 o'clock a.m. [87]

The Court: Is counsel through with examining the defendant? Do you wish to cross-examine?

Mr. Renfrew: I understood there was an unanswered question about the time question that Mr. Coffey said he would answer this morning.

(Testimony of Edward D. Coffey.)

The Court: Then the defendant may resume the stand.

EDWARD D. COFFEY

being called as a witness on behalf of the plaintiff resumes the stand and testifies as follows on further

Direct Examination

By Mr. Nesbett:

Q. Mr. Coffey, is it possible now for you to answer the question to this effect were you in Anchorage between March 30th and July 23rd, 1948?

A. My bookkeeper has been ill and I haven't had time to get full information on that. I can give you partial information, however. I have a statement from the New Washington Hotel that I paid on 4-5-48. I would say I was here about a week and then I again went to Seattle. However, I found another statement of 4-9-48. I don't know whether I went to Portland or—I couldn't have been in Anchorage on the 19th though, I am sure of that. My memory is not too clear, however. I was out of town sometime in June and I am sure I was outside at that time. When I returned it may have been around July, I [88] couldn't give the exact dates due to the illness of my bookkeeper.

Mr. Nesbett: Thank you.

A. If you don't mind me qualifying what I said last night. You asked if an agent that has an agent's license can broker business, which we do, but an agent holding a license can write business

(Testimony of Edward D. Coffey.)

within the City of Anchorage, or a town that has fire protection, but my companies prohibit me from writing unprotected risks out of town. I must submit that to them with full information as to underwriting in order that they might consider the hazardous risks, as they deem many risks undesirable and do not accept them, such as out of town risks, airplane hangars, bowling alleys, gambling, restaurants, liquor and boarding houses. They want us to submit these. They want to consider all the facts on out of town business.

Q. Is that your testimony, Mr. Coffey, that you could not have written the insurance without getting information?

A. It is not our custom to write out of town business of any kind—on anything like that—

Q. Answer the question. Will you answer the question? A. Yes.

Q. Is it your testimony that you could not write a policy on Mr. Polimeni's property without first checking with the parent company and getting permission? A. Yes, that is right. [89]

Q. Is it your testimony that you could not have written a policy based on Mr. Polimeni's letter of April 17th without checking with your parent company?

A. That is right. We would have submitted.

Q. Isn't an agent authorized to bind the companies he represents up to a certain limit on unprotected property?

A. It is not our understanding to bind—

(Testimony of Edward D. Coffey.)

Q. Isn't it possible?

A. It is possible if we violate our companies agreement. In our agreements——

Q. What is meant by the term issue on an insurance policy? A. To write a policy, I suppose.

Q. You insure everything, don't you?

A. No, we don't. We submit it.

Q. You advertise all over, don't you, Coffey insures everything, remember?

A. We submit it.

Q. Don't you have as much power as any agent in the Territory of Alaska in writing insurance?

A. I think we do on protected stuff.

Q. Wouldn't it have been possible from Mr. Polimeni's letter of April 17th to have bound four or five of the companies you represent as agent to a limited extent to cover Mr. Polimeni for a total of ten thousand dollars? A. No sir. [90]

Q. Is it your testimony that you never do that?

A. No, we don't do it until it is submitted to the company if it falls in these categories.

Q. You mean a restaurant?

A. Yes. That is right.

Q. Would it have been possible for you to have bound four, five or six of your people on it without submitting to the parent company first?

A. That is right.

Q. Is it your testimony you could not have done that covering certain property in South Naknek for so many dollars?

(Testimony of Edward D. Coffey.)

A. They don't want to accept unprotected risks without full information.

Q. You have never done that? A. No.

Q. Is it possible to have done that?

A. I beg your pardon.

Q. Could you have done it?

A. We don't do it not on unprotected risks.

Q. Then you have never in the conduct of your business done anything like that?

A. We may have a few years ago, but in the last few years several companies have withdrawn from the territory due to unfavorable experience on out of town and prohibited risks.

Q. Is it your testimony that you never did anything like that [91] during the year 1948?

A. You are asking me a question that I don't—

Q. If you don't want to say.

A. I don't know. I will put it that way.

Mr. Nesbett: Your Honor, I subpoenaed Mr. Joseph Sheahan for 10 o'clock. I don't see him.

The Court: Did you have the subpoena issued in time?

Mr. Nesbett: Yes.

The Court: Has the subpoena been served?

Mr. Nesbett: Yes.

The Court: What is the name?

Mr. Nesbett: Mr. Joseph Sheahan.

The Court: Will you look in the Marshal's Office to see if he may be there.

Q. Mr. Coffey, you represent one company as general agent, I believe you said. A. Yes.

(Testimony of Edward D. Coffey.)

Q. Which company is that?

Mr. Renfrew: Object as immaterial.

The Court: In view of the testimony——

Mr. Renfrew: It is his witness.

The Court: I know, but he is the adverse party and the examination may be conducted as a cross-examination.

Mr. Nesbett: I have no wish to drag one company's [92] name out more than any other. He may designate it as "Company A."

The Court: That will be the ruling.

Q. What are your powers then with this company as general agent?

A. We are general agents for the accident and health business only.

Q. How many companies do you represent as agent for the writing of fire insurance?

A. I would say roughly nine.

Q. Roughly nine companies? A. Yes.

Q. Could you state, Mr. Coffey, without checking your records the limitations you had with relation to binding each of these nine companies on a risk?

A. In town they have block limits.

Q. Block limits?

A. They have block limits. In Anchorage one company may say we will permit you to write not more than five thousand dollars on a risk in the incorporated town of Anchorage, and not more than fifty thousand dollars in the block. That makes in a full block we will say bounded by Fourth and Fifth and by E and D.

(Testimony of Edward D. Coffey.)

Q. Alright, now what powers do you have with these nine companies outside incorporated areas?

A. We have two companies only that we could write on a residence fifteen hundred dollars each on residences unprotected. That is out of town. The other we have to submit for their advice if they would like to accept the business.

Q. That can be submitted either by wire or by letter, can it not? A. That is right.

Q. And upon confirmation by the parent company the risk is in force? A. That is right.

Q. As a matter of fact, it is customary among agents to state that you are now insured before you have ever checked with the company?

Mr. Renfrew: That is calling for a conclusion.

Mr. Nesbett: If it is the custom it certainly wouldn't be.

The Court: You mean the particular custom, or the general custom?

Mr. Nesbett: The general custom.

The Court: The next question is whether evidence of a general custom of this kind might be inconsistent with the terms of the policy, because if it is it cannot be admitted because of the terms of the policy.

Mr. Nesbett: I have done a little research and it seems to me that he is bound and the company is bound by [94] the general custom.

The Court: But the point I make is entirely different, that if the custom would tend to contra-

(Testimony of Edward D. Coffey.)

dict any of the written provisions of the policy or its terms it wouldn't be admissible.

Mr. Nesbett: You mean the agency agreement, Your Honor, rather than the policy.

The Court: No, the policy.

Mr. Nesbett: But I haven't brought anything in about the policy.

The Court: You are building up the general customs of insurance agents.

Q. Could an agent say Mr. Jones I have checked your property over and you are insured for seven thousand dollars and when the confirmation came through it would be insured nunc pro tunc to the time he said Mr. Jones you are insured?

Mr. Renfrew: Your Honor, that question is completely hypothetical. It is irrelevant in this case up to this point, because what difference would it make if the agent would say that, if he didn't bind the insurance it wouldn't bind the company, and there is no testimony that Mr. Coffey, or anyone in his office, said this, and if it were a custom—even if it were—it isn't revelant.

The Court: If it is a general custom he would be presumed to know of it and be bound by it seems to me that [95] the question——

Mr. Renfrew: How is it material, Your Honor, in the instant case?

Mr. Nesbett: Your Honor, as I see it it is material in this respect we have also charged Mr. Coffey with negligence. After undertaking to procure insurance he failed to go through with the

(Testimony of Edward D. Coffey.)

plan and it is relevant that we know whether or not it was possible for him to insure Polimeni upon the receipt of this information that Polimeni forwarded to him.

Mr. Renfrew: I submit the witness answered that and said it was impossible for him to do that.

Mr. Nesbett: Under his agency agreement it might be, Your Honor, but as I see it he is bound by what power the public thinks he has.

Mr. Renfrew: I will eat any law books that substantiate that, Your Honor.

Mr. Nesbett: I will dig up some.

The Court: The only way it would be relevant is on the question of the ostensible authority of the agent. In other words if it is a general custom of insurance agents to do that it would certainly be presumed that the insurance carriers themselves would know of it and if they did nothing about it it would be within the scope of the agent's authority. Maybe you better ask the question again.

Q. Isn't it the general custom, Mr. Coffey, among agents [96] after learning the details of the application to state alright you are insured, and then confirm with their company by telegram, or by letter, and after getting the confirmation have the insurance become effective as of the time they first said it was insured.

A. If we wired the company they come back and say this is binding. I will try to answer it this way for you, if you meet a man on the——

Q. Just answer the question.

(Testimony of Edward D. Coffey.)

Mr. Renfrew: Let him answer.

A. I am trying to help you. If I met a man on the street and he said, "Ed, I would like you to insure my house," I say where is it located. We are talking about Anchorage, because we do have binding authority to a certain extent on protected property. I would try to find out whether it was next to a gambling house, family boarding house, or something of this category, and knowing the man and the moral risks connected with it—whether he has had any losses and knowing the man I would ask him how much he wanted on it. He would say five thousand dollars and I would say how much you want on the house and how much on the furniture. If that was in the City of Anchorage, and we were not violating our authority, I would go in the office and write up a binder. We would retain one and send one out, but in order to protect ourselves with the company we would drop the binder in the mail and that would [97] suffice for them to issue the policy that particular day. Out of town risks we would not bind on any prohibited risks.

Q. On that particular situation you have recited, the company is bound as of the time you drop it in the mail?

A. That is the only time they will bind according to our interpretation.

Q. Suppose it was a residence outside the incorporated area and you agreed to insure for a certain sum of money and you wired your company for

(Testimony of Edward D. Coffey.)

confirmation, isn't it common custom to consider the insurance going into effect as of the time you told the man after the confirmation comes through?

A. Only the amount we are qualified to write for. There are only the two companies that we have authority from to write fifteen hundred dollars on a risk.

Q. Then if you covered five or ten thousand dollars the insurance would be considered as having gone through as of the time you told him?

A. We have authority from only two companies on out of town risks.

Q. Assuming you sent in the wire to get authority. In other words take this situation. You have all the details on Polimeni's restaurant, one thousand feet from the school building, three hundred feet from the postoffice and so forth, and you wire for authority, in other words confirmation on that risk, isn't it generally considered that Polimeni would be covered [98] at the time you send in the application, although the confirmation comes through later?

A. No, there is no binding there until the company says there is binding. There couldn't be.

Q. After the company says we will accept that risk isn't it generally considered as insured as of the time you accepted the application?

A. So far as we are concerned it is binding from the time the company says it is binding.

Q. Is your answer then no?

A. It would have to be.

(Testimony of Edward D. Coffey.)

Q. You are positive of that? A. Yes.

Q. Will you answer this, Mr. Coffey? After receiving Mr. Polimeni's letter of April 17th—you read it I guess?

A. I am not too familiar with it. I would like the copy again if you want to refer to it. It was taken care of in my office while I was away and not by me.

Q. It is marked Defendant's Exhibit 3 in defendant's answer.

A. If you don't mind I want to familiarize myself. Previous to that exhibit.

Mr. Renfrew: May we have a short recess, Your Honor. It is going to take Mr. Coffey at least ten or fifteen minutes to read that correspondence.

Mr. Nesbett: Your Honor, it needn't take that long. He wrote it.

Mr. Renfrew: He says he didn't write it. Counsel knows that.

The Court: I think that the time spent in recessing and re-assembling here would suffice for him to go through that, and since it is only half hour since we started out we should continue.

Q. Will you look at that letter? A. Yes.

Q. Wouldn't it have been possible after receiving that letter to immediately dispatch a wire to your company, asking for confirmation on the property, saying something to this effect details to follow, or could you have sent off a wire?

Mr. Renfrew: You mean physically or within the scope of his authority?

(Testimony of Edward D. Coffey.)

The Court: I think, of course, he is referring to whether or not his authority would permit him to do so.

Q. Well, I don't think you are looking at the letter now.

Mr. Renfrew: It is obvious, Your Honor, that this question cannot be answered until the person familiarized themselves with the preceding letter and the following letter. Unless Mr. Nesbett gives Mr. Coffey a chance to do that.

A. If the office would feel that this was sufficient information and knowing the background as to previous loss experience then they would ordinarily transmit an airmail letter for [100] the submitting of this business. Does that answer your question?

Q. For the submitting of it?

A. For the company's consideration.

Q. In other words, your office on receipt of that application and information would send an airmail request to the parent company?

A. If we felt the information was sufficient—what they wanted.

Q. It would have been within your power to have done so? I mean it would have been customary to have done it?

A. If we felt there was sufficient information in the letter it would probably have been a routine matter of transacting business.

Q. Then on receipt of this letter the parent company would have considered the application?

(Testimony of Edward D. Coffey.)

A. Yes, they would have either said they would have accepted it or not.

Q. If you had telegraphed?

A. We hesitate to send telegrams, because the customer doesn't like to have to pay for it.

Q. If you had telegraphed them they would also?

A. If we had requested them to telegraph they would have. Yes.

Mr. Nesbett: I believe that is all, Your Honor.

Mr. Renfrew: No questions.

Mr. Nesbett: Mr. Joseph Sheahan is here now, Your Honor. I want to call him.

JOSEPH SHEAHAN

being called as a witness on behalf of the plaintiff and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Nesbett:

Q. Your name is Joseph Sheahan, is it not?

A. Yes. Joseph Sheahan.

Q. S-h-e-a-h-a-n? A. That is right.

Q. You are engaged in the insurance business in Anchorage, are you not? A. I am, Yes.

Q. What is the name of your company, Mr. Sheahan? A. Joseph W. Sheahan Agency.

Q. How long have you been engaged in the insurance business altogether, Mr. Sheahan?

A. That is disclosing my age, but it has been about thirty-two years.

(Testimony of Joseph Sheahan.)

Q. How long have you been engaged in the insurance business in Alaska?

A. I think five and a half to six years. [102]

Q. I will ask you whether or not you have ever worked for Mr. Ed Coffey of the Coffey insurance company?

A. Yes, I have.

Q. How long did you work with Mr. Coffey, Mr. Sheahan?

A. About a year and two months, I believe.

Q. You know approximately the date you terminated your association with Mr. Coffey?

A. January 22nd, 1948.

Q. Mr. Sheahan, I have talked with you about this case, haven't I?

A. Yes.

Q. I showed you some correspondence involved in this case, did I not?

A. Yes, but I don't recall it.

Q. How many companies do you represent as agent?

A. Seven.

Q. You represent any as general agent?

A. No, none.

Q. Seven companies just as agents?

A. Local agents. We call them, of course, agents. Yes.

Q. Mr. Sheahan, do you have any authority as agent of your companies to bind risks?

A. Of the companies that I——

Mr. Renfrew: Just a moment. We object to any further testimony on this line. It is incompetent, irrelevant [103] and immaterial. What Mr. Shea-

(Testimony of Joseph Sheahan.)

han's custom in his business might be is not binding in any matter whatsoever on Mr. Coffey. If they represented the same companies, but there is no showing, and if they represented different companies——

Mr. Nesbett: I would like to show which companies they represent, maybe they do represent the same companies.

The Court: No, I don't——

Mr. Nesbett: I still think the question is proper, Your Honor, to get the relative authority of the two agents.

The Court: Don't you have to show first that the practice of insurers is the same?

Q. I will ask you what is the practice of parent companies with respect to delegating powers to their agents.

Mr. Renfrew: Same objection. It is absolutely immaterial. There is no possible way it could be material. I can't see any theory on which such an answer could have any issue in the case at bar.

Mr. Nesbett: I expect to tie this in to support my case against Mr. Coffey on negligence, and I assure Your Honor I have a definite plan.

The Court: Overruled. Proceed.

A. Insurance companies—I am embarrassed, frankly, because I have the highest regard for Ed.

Q. Mr. Sheahan, you are not here of your own free will and accord? A. No, I am not.

Q. I subpoenaed you as a witness and gave you a days pay?

(Testimony of Joseph Sheahan.)

A. That is right. Insurance companies invariably give you what they call a prohibited list. It is called a K-O list. It means keep off. There will be certain risks but they do give you authority to bind. By binding I mean to cover certain risks. Inside of town, where it is protected, your authority is far greater than it is in outside unprotected areas. I think that usually the authority outside is to twenty-five hundred dollars a company.

Q. The authority, Mr. Sheahan, to bind the company without——

Mr. Renfrew: I move that the answer be stricken from the record and the jury instructed to disregard it on the ground it has no bearing on anything with which Mr. Coffey, who is the defendant in this case, is concerned, and even if Mr. Sheahan has a company to bind up to twenty-five hundred dollars it would have no bearing whatsoever on Mr. Coffey.

The Court: That would be true if it were the extent of the examination, but I am going to let it go. Objection overruled.

Q. Is it your testimony that the general authority of the agent to bind the company he represents on outside risks is twenty-five hundred dollars? [105]

A. Some are more liberal than others. Some will go fifteen hundred or two thousand dollars and others will tell you to use your good judgment and go to ten thousand.

Q. Mr. Sheahan, if you had received correspondence as Mr. Coffey did, commencing with Exhibit 1

(Testimony of Joseph Sheahan.)

of defendant's answer through Exhibit 5, will you state to the Court what procedure you would have followed?

Mr. Renfrew: Objected to as calling for an opinion of this witness, is not binding upon the defendant and surely he can't answer what he would have done not knowing the companies Mr. Coffey represents.

The Court: I think the objection should be sustained. I think all he can do is answer what could have been done according to general custom.

Q. Mr. Sheahan, if you had received an application for insurance from Naknek on March 30th and——

Mr. Renfrew: Just a moment. We object to counsel's statement of an assumption of an application. There is nothing in the record to indicate there was any application made on the 30th day of March.

The Court: You mean a formal application?

Mr. Renfrew: Any kind of application at all. There is not a thing before the jury or before the Court.

Mr. Nesbett: That is Exhibit 1.

Mr. Renfrew: There is no exhibit before the Court. [106]

Mr. Nesbett: It is a part of the pleadings.

Mr. Renfrew: It is not an exhibit and not an application.

Mr. Nesbett: You labeled it as an exhibit and attached it to your answer.

(Testimony of Joseph Sheahan.)

Mr. Renfrew: It is not in evidence, Your Honor.

The Court: No, it is not in evidence and I think before it could possibly go before the jury it would have to be introduced. Yes, I think it would have to be introduced, otherwise it wouldn't go before the jury.

Mr. Nesbett: I will withdraw the question then. Is it your ruling, Your Honor, that I cannot show it to the witness, that I cannot show to the witness any of the exhibits attached to the defendant's answer?

The Court: I think you ought to have it marked for identification first.

Mr. Nesbett: I will request that five, or seven, no all nine, Your Honor.

The Court: The reason I rule that way I do not submit pleadings to the jury. If I did they would go in that way as part of the pleading.

Mr. Renfrew: Your Honor, I have never heard of a practice such as this. He takes a pleading out of the file, or his copy, and he asks that it be marked for identification. What is it? [107]

Mr. Nesbett: Defendant's Exhibits 1 to 9 attached by Mr. Renfrew's office to the answer.

Mr. Renfrew: I haven't any exhibits before this jury at all, and if he has anything there it is merely a copy of a pleading and that is all he has.

The Court: But the Court has ruled that he should introduce these exhibits into evidence, or for identification, in order that they may be marked. It is obvious they cannot be marked otherwise.

(Testimony of Joseph Sheahan.)

Mr. Renfrew: I think that is correct, Your Honor, but I thought he was going to have them marked and handed to Mr. Sheahan.

The Court: It merely involves the order of proof and in order to save time you could take this witness off the stand and put somebody else on to make the offer of the exhibits. However, I will permit the order of proof to go on this way.

Mr. Nesbett: Your Honor, Mr. Coffey swore to that answer.

The Court: That may be, but since they haven't been offered in evidence I thought you would perhaps want to resort to this method. However, if you want to——

Mr. Nesbett: No, Your Honor, I would like to save time, the same as you.

The Court: It will save time to offer them as admissions of the plaintiff now. [108]

Mr. Nesbett: I will do that.

The Court: They may be admitted and marked Plaintiff's Exhibits 1 to 9.

PLAINTIFF'S EXHIBIT No. 1

So. Naknek, Alaska,
Mar. 30, 1948.

Edward D. Coffey,
Anchorage, Alaska.

Dear Sir:

At this time I am writing concerning an insurance policy covering my new restaurant in So. Naknek,

(Testimony of Joseph Sheahan.)

Alaska, which houses private living quarters on the second floor and the restaurant on the first floor.

Please inform me as to the type or types of policies necessary to insure the building and all fixtures including automatic pump, light plant, dishes, meat saw, and food supplies.

What form of policy is necessary to cover a seasonal beer and wine supply brought in in the fall valued at (\$3,000.00), three thousand dollars?

Sincerely,

/s/ ANTONIO POLIMENI.

[Endorsed]: Filed August 22, 1950.

PLAINTIFF'S EXHIBIT No. 2

April 9, 1948.

Mr. Antonio Polimeni,
South Naknek, Alaska.

Dear Mr. Polimeni:

Re: Fire Insurance on Building occupied as
Restaurant & Dwelling

In reply to your letter of March 30th wish to advise that the fire insurance rate on both building and contents is \$3.00 per \$100 of insurance for one year.

It is necessary to place a specific amount of insurance on the building and a specific amount on equipment and supplies. Beer and wine would be insured

(Testimony of Joseph Sheahan.)

under stock. We enclose form which indicates how the insurance is divided.

If insurance is ordered, we will need to have a description of the location of the property. If the land is unsurveyed so you cannot give us lot and block numbers, please advise how far distant your building is from the Post Office or the Public School Building. Also advise the construction and occupancy of any buildings within 100 feet of your building.

We trust this is the information you desire.

Very truly yours,

EDW. D. COFFEY.

PLAINTIFF'S EXHIBIT No. 3

South Naknek, Alaska,
April 17, 1948.

Edward D. Coffey,
Anchorage, Alaska.

Dear Sir:

Having received your reply to my inquiry concerning my insurance, I am supplying necessary description of the property and equipment.

The main restaurant building is (1000') one thousand feet from the South Naknek Territorial School Building and approximately (300') three hundred feet from the Post Office.

1. Main Building: 30'-30'

Restaurant—two story building housing booths,

(Testimony of Joseph Sheahan.)

counter, kitchen, pastry room, laundry on the first floor, with five rooms on second floor for living quarters for owner and hired assistants, and basement (18'-20') eighteen by twenty feet providing storage capacity for restaurant supplies and special compartment for automatic pump connected to the well inclosed within the building with descent from kitchen. Attached to kitchen and pertaining to service thereof are kitchen range, hot and cold water tank, and sink.

2. 8'-10' building 50' from main building

This building is used for housing light plant providing electrical power for restaurant and used as a repair shop.

3. 6'-8' 20 feet from main building

Separate restrooms with shields for entrances. These buildings mentioned have tin roofs and are to be insured en masse for (\$6,000.00) six thousand dollars.

Equipment and Supplies

Furniture:

Five beds complete with all season bedding, three wardrobe bureaus with clothing of owner and assistant, six chairs, two tables, one sewing machine, and one phonograph (electric).

Fixtures:

Washing machine, electric iron, complete line of China and silverware for serving one hundred capacity, and bowls, platters, and beer and wine glasses.

(Testimony of Joseph Sheahan.)

Machinery:

Gasoline engine, automatic water pump, 8 K.W. light plant.

The furniture, fixtures, and machinery are to be insured for (\$1,500.00) fifteen hundred dollars.

Stock:

Complete line of food supplies for restaurant operation for six months including small amounts of beer and wine. The stock is to be insured for (\$2,500.00) two thousand five hundred dollars.

I trust this is the complete and necessary description for my insurance application.

Thank you.

Sincerely,

/s/ ANTONIO POLIMENI.

Received April 24, 1948.

PLAINTIFF'S EXHIBIT No. 4

So. Naknek, Alaska,
June 1, 1948.

Ed. Coffey,
Anchorage, Alaska.

Dear Mr. Coffey:

I have written you before concerning my insurance for my restaurant and I have received no reply.

I would like to hear from you immediately and learn the particulars and premium of the policy.

(Testimony of Joseph Sheahan.)

Are there corrections to be made or what needs to be done?

Please reply immediately.

Thank you.

Sincerely,

/s/ ANTONIO POLIMENI.

PLAINTIFF'S EXHIBIT No. 5

June 4, 1948.

Mr. Antonio Polimeni,
South Naknek, Alaska.
Dr. Mr. Polimeni:

Re: Fire Insurance on Building occupied
as Restaurant & Dwg.

We are in receipt of your letter of June 1st in regard to your insurance. We wrote you the following letter, mailed April 9, 1948, but evidently it was lost, so we will quote same:

“In reply to your letter of March 30th wish to advise that the fire insurance rate on both building and contents is \$3.00 per \$100 of insurance for one year.

“It is necessary to place a specific amount of Insurance on the building and a specific amount on equipment and supplies. Beer and wine would be insured under stock. We enclose form which indicates how the insurance is divided.

“If insurance is ordered, we will need to have a

(Testimony of Joseph Sheahan.)

description of the location of the property. If the land is unsurveyed so you cannot give us lot and block numbers, please advise how far distant your building is from the Post Office or the Public School Building. Also advise the construction and occupancy of any buildings within 100 feet of your building."

We trust that this is the information you desire.

Yours very truly,

EDW. D. COFFEY.

PLAINTIFF'S EXHIBIT No. 6

Edward D. Coffey
General Insurance
Anchorage, Alaska

July 23, 1948.

Mr. Antonio Polimeni,
South Naknek, Alaska.

Dear Mr. Polimeni:

Re: Fire Insurance on Building occupied
as Restaurant & Dwg.

We wish to apologize for having mislaid your letter of April 17 giving us the details of the property you wish to have insured. We enclose herewith copy of your letter for reference as we need the following breakdown before we can issue policies:

Building No. 1.—Please designate a specific

(Testimony of Joseph Sheahan.)

amount on the building and a specific amount on the equipment.

Building No. 2.—Specific amount on building.

Building No. 3.—Specific amount on building and specific amount on 8 K.W. light plant.

We assume the stock of food supplies is contained within the restaurant and no other building.

Will you kindly give us this information so we may issue your policies.

Very truly yours,

EDW. D. COFFEY,

By /s/ M. KASER.

PLAINTIFF'S EXHIBIT No. 7

Hal M. Marchbanks
United States Commissioner
Kvichak Precinct
Naknek, Alaska

August 2, 1948.

Mr. Edward D. Coffey,
General Insurance,
Anchorage, Alaska.

Dear Mr. Coffey:

Re: Fire Ins. on Building occupied as
Restaurant & Dwelling.

I am writing this letter to advise you the building as above described, burned and the policy also burned so it is impossible to supply it with this letter.

(Testimony of Joseph Sheahan.)

He wishes to put in a claim for the building.

Kindly advise Mr. Antonio Polimeni, of South Naknek, Alaska, of the procedure he is to take.

Sincerely yours,

/s/ HAL M. MARCHBANKS,

United States Commissioner.

HMM:ib

Received August 5, 1948.

PLAINTIFF'S EXHIBIT No. 8

Signal Corps, United States Army
Alaska Communication System

Telegram

Anchorage, Alaska,
Aug. 5, 1948.

HAL M. MARCHBANKS,
U. S. COMMISSIONER,
NAKNEK, ALASKA.

Relet Antonio Polimeni No Insurance In Force as We Have Received No Reply To Our Letters of June Fourth and July 23 Requesting Value Break-down On Building and Equipment Policies On Unprotected Restaurants Have To Be Ordered From Seattle.

EDW. D. COFFEY.

Night Letter

Charge Main 136

(Testimony of Joseph Sheahan.)

PLAINTIFF'S EXHIBIT No. 9

August 5, 1948.

Mr. Antonio Polimeni,
South Naknek, Alaska.

Dear Mr. Polimeni:

Re: Insurance Application

We have just received a letter from Mr. Marchbanks stating your new dwelling and restaurant burned. He did not indicate the date of loss. We are very sorry to have to advise you that not having received a reply to our letters of June 4th and July 23rd we could not order the insurance from the Insurance Company in Seattle. We do not have authority to write unprotected restaurants in our own office, and have to place all applications with Seattle offices. Very few companies will write restaurant occupancies in locations having no fire protection, such as a Volunteer Fire Department. We would have had to place this risk through Lloyds, London and we cannot submit an application until we have all the required information, which we did not have on your property.

We are extremely sorry you were unable to reply to our letters so we could have ordered the insurance.

Yours very truly,

EDW. D. COFFEY,

By

GM
encl

(Testimony of Joseph Sheahan.)

Mr. Renfrew: Are they counsel's copy of the pleadings in this case.

Mr. Nesbett: They are copies of the exhibits to Mr. Renfrew's answer.

Mr. Renfrew: They are your copy of a pleading served on you.

Mr. Nesbett: Yes.

Mr. Renfrew: I will object to them as not the best evidence. I have the originals here and I want to put them in.

Mr. Nesbett: Put in your originals.

Mr. Renfrew: I am going to.

The Court: In the meantime he wants to avail himself of time. You are offering carbon copies of the originals?

Mr. Nesbett: Yes, sir. Attached to the answer.

The Court: If they are carbon copies of the originals they are originals and the objection will be overruled.

Mr. Renfrew: They are not carbon copies of the original?

Mr. Nesbett: No, how could they be? [109]

The Court: Then you better call for the production of the originals.

Mr. Nesbett: Well, Your Honor, how do you suggest we do this. I would have introduced all the letters I have and Mr. Renfrew has the others.

Mr. Renfrew: If he wishes to call on me for the originals I have I will produce them.

The Court: If he has not the originals and you

(Testimony of Joseph Sheahan.)

have the originals he has the right to demand from you the originals he hasn't got.

Mr. Renfrew: That is what I have been saying.

Mr. Nesbett: Mr. Renfrew, will you kindly produce yours and I will produce mine.

Mr. Renfrew: With the greatest of pleasure, sir. It is understood, Your Honor, that these are being offered as exhibits by the plaintiff. I furnish the letter of March 30th, which may or may not be in the actual enumeration of the exhibits, might not correspond with the number in the pleadings, if not they will confuse the record, but I tender to you first the letter of March 30th.

The Court: I am inclined to think, however, that the exhibits should be marked in chronological order.

Mr. Renfrew: I think they should. The letter of March 30th is the first letter of Polimeni. I suggest that counsel submit the letter of April 9th, which was in reply to [110] the letter of March 30th.

Mr. Nesbett: Your Honor, I don't have the original of the letter of April 9th. Mr. Polimeni wrote his letters in longhand, or the school teacher did.

Mr. Renfrew: You must be confused. The letter of March 30th is Mr. Polimeni's letter, and you have the letter from Mr. Coffey, dated April 9th.

Mr. Nesbett: No, I haven't got that one.

Mr. Renfrew: Where did you get a copy of it?

Mr. Nesbett: You very kindly put it in your pleading.

Mr. Renfrew: Alright, I will stipulate. May I

(Testimony of Joseph Sheahan.)

find out if this is a carbon of the original, sir?

The Court: Yes.

Mr. Renfrew: Is that a carbon of the original?
I will tender a carbon copy of the original letter.

The Court: It may be admitted.

Mr. Renfrew: That is 1. This will be 2.

Deputy Clerk: That is right.

Mr. Renfrew: Then I tender, Your Honor, a letter dated April 17th, which is the original letter of Mr. Polimeni, as Exhibit Number 3.

Mr. Nesbett: No objection.

Mr. Renfrew: You are offering these. I am not.
I am tendering them to you. [111]

Mr. Nesbett: Alright.

Mr. Renfrew: Then I tender the letter of June 1st, 1948, as Exhibit 4, which is the original letter of Mr. Polimeni. Then I will call upon counsel to produce the original of the letter of June 4th.

Mr. Nesbett: Let's see. I have not got it, Your Honor.

Mr. Renfrew: What have you got there?

Mr. Nesbett: Will you stipulate that that copy can go in?

Mr. Renfrew: Is this a carbon copy of the original letter?

Mr. Nesbett: This is a carbon copy of the original letter.

Mr. Renfrew: The next correspondence should be July 23rd. Do you have that?

Mr. Nesbett: Yes, I have that.

Mr. Renfrew: That will be five.

(Testimony of Joseph Sheahan.)

Deputy Clerk: Six.

Mr. Renfrew: The next is the original letter of Mr. Marchbanks, which appears to be number seven. You have the telegram?

Mr. Nesbett: I think I have that. Is that to Marchbanks?

Mr. Renfrew: That is the August 5th telegram. [112]

Mr. Nesbett: No.

Mr. Renfrew: I will tender the carbon copy of the telegram of August 5th. You have the letter to Mr. Polimeni of August 5th?

Mr. Nesbett: No, I haven't.

Deputy Clerk: The telegram is Plaintiff's Exhibit 8.

Mr. Renfrew: Then I will submit the carbon copy of the letter of August 5th, confirming the telegram.

Deputy Clerk: Defendant's Exhibit 9.

Mr. Renfrew: Now, before we proceed may I get the chronological order of those. The March 30th letter is that plaintiff's exhibit 1?

Deputy Clerk: Yes.

Mr. Renfrew: The April 9th letter is Plaintiff's Exhibit 2?

Deputy Clerk: Yes.

Mr. Nesbett: Do you have any objection to allowing the witness to look at Exhibits 1 through 9 as attached to your answer?

Mr. Renfrew: He can look at the Sears-Roebuck catalogue so far as I am concerned.

Q. (By Mr. Nesbett): Referring to Exhibit

(Testimony of Joseph Sheahan.)

No. 1, Mr. Sheahan, would you mind glancing through that hurriedly? [113] A. Surely.

Q. And Exhibit 2, the letter of April 9th following after that. Now, Mr. Sheahan, the letter of April 17th, will you examine that letter, please.

A. April 17th?

Q. Yes.

A. It is to Edward D. Coffey, Anchorage, Alaska.
Dear Sir——

The Court: You don't have to read it. Just read it to yourself and consider it. I mean you don't have to read it aloud.

A. Yes. That man ordered insurance.

Q. The letter of April 17th is an order for insurance according to the custom of the insurance world, Mr. Sheahan? A. Yes.

Q. What would have been the ordinary procedure for the agent to follow upon receipt of an order?

A. The agent in this case needed a little more information.

Q. What did he need?

A. He naturally wanted to know how much insurance would be placed on each building.

Q. That is right. Now that was the only thing lacking, was it not?

A. Yes, I would say so. He would have to know how much insurance to apply on each building and how much on equipment in each building. [114]

Q. Could the agent according to the general

(Testimony of Joseph Sheahan.)

practice have gone ahead and effected a temporary coverage without that information?

A. I would say yes.

Q. How could he have accomplished that, Mr. Sheahan?

A. By having written a letter to the insured, telling him he was covered, and to have asked him to send the additional information, that is how much on each building.

Q. Then, Mr. Sheahan——

A. Beg pardon.

Q. How would the agent have procured the coverage? A. He has authority——

Mr. Renfrew: We object to this question and we move the last answer be stricken on the ground that it never had any effect on Mr. Coffey, unless it is shown Mr. Coffey had authority. I submit, Your Honor, if the agent did not have the authority to bind that wouldn't bind him in any shape or form.

Mr. Nesbett: It goes back to the custom between the agent and his parent company.

The Court: You would have to show that the general customs of the business encompassed this.

Mr. Nesbett: The answer was not stricken?

The Court: No.

Q. I will ask you this. Is your last answer based on the [115] custom followed by insurance agents throughout the United States and Alaska? You understand my question?

A. Very well. An agent has an authority to bind ordinarily——ordinarily according to his judgment.

(Testimony of Joseph Sheahan.)

Q. Within limits?

A. Your judgment limits that, yes.

Q. Will you amplify on that answer, if you please, so the Court and jury will understand just what you mean?

A. Yes. South Naknek is naturally an unprotected area. They have no fire department, I believe, and so when you have a fire down there you can just pray for rain and that is about all, and so you won't go as far as you would in Anchorage or Palmer in writing insurance. I would say that I would go twenty-five hundred dollars in any of my companies down there.

Q. Twenty-five hundred in any of your companies? A. Yes.

Q. Could you have effected the insurance coverage of ten thousand dollars by binding four companies on four separate policies?

A. Oh, yes.

Mr. Renfrew: Object to that answer and the one previous and ask it be stricken and the jury instructed. What this man did or could have done is not binding on Mr. Coffey.

Mr. Nesbett: He says it is based on custom and usage. [116]

Mr. Renfrew: The custom and usage he says he could have bound in the companies he has. Mr. Coffey didn't. He had only two companies and he was limited to fifteen hundred dollars in each company.

(Testimony of Joseph Sheahan.)

The Court: It seems to me here the question is not custom and usage, but specific authority.

Mr. Nesbett: I expect to show Mr. Coffey had more authority than he testified to.

Mr. Renfrew: Why don't you?

The Court: If you intend to make a showing of that kind this evidence will be permitted, but it will be stricken unless you connect it up.

Mr. Renfrew: How could this be connected up with that? We can bring in ten agents with different authority. That won't impeach Mr. Coffey. He can't do it by asking this man what authority he has.

The Court: Of course, in making a showing of that kind he is not limited to the questions he asks

Q. Mr. Sheahan, I believe you testified, did you of this witness. He may call several other witnesses to the stand, but if he is to be permitted to make that showing he cannot be limited to this.

Mr. Nesbett: Your Honor, may we have a five minute recess.

The Court: We will recess five minutes. [117]

(After a short recess Court is reconvened at 11:20 o'clock a.m., April 18th, 1950.)

JOSEPH SHEAHAN

having previously been called as a witness on behalf of the plaintiff, resumes the witness stand and testifies as follows on

Further Direct Examination

By Mr. Nesbett:

(Testimony of Joseph Sheahan.)

not that your association with Mr. Coffey terminated on January 22nd, 1948?

A. That is right.

Q. Now, Mr. Sheahan, if you had received that letter of April 17th on January 21st of 1948, while you were still associated with Mr. Coffey, could you through Mr. Coffey's companies have effected a ten thousand dollar coverage on Mr. Polimeni's restaurant?

Mr. Renfrew: Objected to as immaterial and irrelevant what he could have done on the 21st of January.

Mr. Nesbett: It was only two or three months in Mr. Coffey's office there before the time that letter was written, and it is relevant whether or not he could have effected that coverage manipulating Mr. Coffey's power.

The Court: Objection overruled. [118]

Mr. Renfrew: What was the date of the termination again?

Mr. Nesbett: January 22nd, 1948.

Q. You may answer that question, Mr. Sheahan?

A. Yes. I would have put twenty-five hundred dollars, or perhaps fifteen hundred in an American company and wired to Lloyds in Seattle.

Q. In Seattle?

A. For the balance.

Q. Would you have requested telegraphic confirmation, Mr. Sheahan, as a general practice?

A. Yes. Oh, yes they wire right back, usually the next day.

(Testimony of Joseph Sheahan.)

Q. Mr. Sheahan, what is the practice, or what was the practice in Mr. Coffey's office with respect to telegraphic requests and telegraphic confirmations as of January 22nd, when you terminated?

A. We telegraphed for coverage. We would ask for a reply immediately—confirmation in other words.

Q. What was the policy in Mr. Coffey's office with respect to paying for these telegrams? I mean by that would he require the customer to pay that, or would you pay it?

A. No, we paid it.

Q. Was that the general rule?

A. I believe for all of mine.

Q. Can you state generally how long would it have taken to [119] effect this additional coverage with Lloyds?

A. With a small amount like seventy-five hundred, that is all the policy we would have issued in excess of the warranty policy, we would get an answer the next day.

Q. Mr. Sheahan, in that situation we have just gone over when would Mr. Polimeni's coverage have commenced?

Mr. Renfrew: May I have his question again.

(Reporter reads the last question.)

Mr. Renfrew: I object to the form of the question. I don't see how it could be answered intelligently.

Mr. Nesbett: I have gone over it step by step.

The Court: I think the question is somewhat indefinite in form. If you want to show whether or

(Testimony of Joseph Sheahan.)

not after approval it would have been made retro-active to a certain time, or some other event of the transaction, you could do that.

Mr. Nesbett: I thought that would be covered in the answer. He could say either on receipt of the confirmation or receipt of the letter it was good coverage.

The Court: If he would answer it that way, but he is looking through the file as if to ascertain the date of some letter.

Mr. Nesbitt: If the witness can answer would Your Honor permit him?

The Court: Yes.

A. A letter dated July 23, 1948, addressed to Mr. Antonio [120] Polimeni, signed by Grace McConnell, says——

Q. Just a moment, I am not concerned with that letter, Mr. Sheahan. I am concerned with the letter of April 17th. What the agent did or would have done in the usual course of business toward effecting insurance coverage.

A. The usual course of business when the first letter from Mr. Polimeni was received you would turn the business down. You would have asked him exactly like the Coffey Agency did how far removed other buildings were from the premises there.

The Court: That isn't the question. The question, as I understand it, is when would the insurance take effect once approved.

(Testimony of Joseph Sheahan.)

A. Once approved? On July 23rd they state, "Will you kindly give us this information, so we may issue your policies."

The Court: I think that the witness——

Mr. Nesbett: May I proceed, Your Honor?

The Court: Yes.

Q. We were discussing the letter of April 17th, containing that information. I asked you what the agent would have done on receipt of that letter in the usual course of business.

A. He would have bound the coverage right then, but written exactly the same letter he did, asking how much insurance he wanted on each building.

Q. Then, Mr. Polimeni would have been covered at the time the agent wired and placed part of the request on the warranty company? [121]

A. That is right.

Q. You could have done that on January 21st under the usual procedure and the authority of Mr. Coffey's position could you not?

A. I hate to say it, but I could have, yes.

Q. Well, all we ask, Mr. Sheahan, is that you tell the truth regardless. You are not here of your own free will and accord.

Mr. Renfrew: Object to this prejudicial explanation that is going on.

The Court: Remarks of that kind should be avoided.

Mr. Nesbett: That is all, Your Honor.

(Testimony of Joseph Sheahan.)

Cross-Examination

By Mr. Renfrew:

Q. Mr. Sheahan, you stated you have been in the insurance business for thirty some odd years, I believe. A. That is right.

Q. Were you ever in business for yourself until you came to Alaska? A. No.

Q. You have always worked for someone else until you left Mr. Coffey's employ?

A. Yes, for a little while I was in business for myself, and [122] another agent bought it out, but not very long.

Q. Your principal experience has been that of insurance salesman, has it not?

A. That is right.

Q. Have you always familiarized yourself with the company's policy as to paying for telegrams and things of that nature, or did you just assume they did?

A. No, I was with one company for twenty-five years, the largest company in Oregon and they paid for theirs.

Q. Is that the reason you testified Mr. Coffey paid for his, because the agent in Oregon did?

A. No, but the agency in Oregon is fifty times as big as Coffey and I assumed——

Q. In other words, you are testifying not from what you know, but what you assume.

A. My bill for telegrams runs around a hundred and twenty dollars a month.

(Testimony of Joseph Sheahan.)

Q. And you pay for it yourself?

A. Yes.

Q. Occasionally, on airplanes I know Ed used to charge people for telegrams.

Q. Now, to get down to this case, Mr. Sheahan, I believe you testified that upon receipt of the letter of April 17th, which you have looked at and which is the letter purporting to give the information upon which the insurance was to be written, [123] that you could have covered the prospective customer by writing, excuse me, by writing him and telling him you would cover him and then asking how much insurance he wanted on each building.

A. I would have wired him.

Q. That would have been a matter of just your personal way of doing business?

A. If a man wants insurance he wants it right now and you just as well wire, I think.

Q. Actually you could not have bound that insurance without further information?

A. Yes, I could have bound it and then asked him for the information.

Q. Now then, there are three buildings involved in that application of April 17th. Supposing you say you are bound, Mr. Polimeni, but I have to know how much you want on each building.

A. That is what I would have done.

Q. Before he can answer this the main building burns down. How much would you pay out?

A. The actual value of the building.

(Testimony of Joseph Sheahan.)

Q. But you haven't any contract with him at that price? A. No.

Q. You think your company would have been bound if you had wired? [124]

A. Yes, I do, and furthermore you once came from Naknek and you said you wanted some insurance for somebody down there and I said it is covered.

Q. That is very possible. I don't remember it. But were they covered?

A. They were covered if I said so.

Q. As a matter of fact you said the Alaska Sportsman was covered when they weren't. That is the airplane that cracked up?

A. That is not——

Q. That is a horse on you.

Mr. Nesbett: Just a moment——

A. No, that is not accurate at all.

Q. You——

Mr. Nesbett: Just a moment. Let him answer the question.

The Court: Isn't he answering?

Mr. Nesbett: Mr. Renfrew is trying to butt in.

Mr. Renfrew: No, I'm not.

A. You are talking about the——(Inaudible)

Q. No, about the boy up at Sheep Mountain and your company said they are not bound, you had no authority.

A. No, you are talking about Lloyds and we have no binding authority on Lloyds.

(Testimony of Joseph Sheahan.)

Q. Mr. Sheahan, just a moment ago you wanted to place this [125] insurance with Lloyds?

A. I wanted to wire Lloyds and get an answer back.

Q. In other words, you would have written Polimeni you are insured, but you wouldn't have covered him until you got a confirmation from Lloyds?

A. I would have gotten it the next day and I would have wired Polimeni as soon as I got the confirmation, yes.

Q. Aren't you assuming something, Mr. Sheahan? Do you think Lloyd's would have covered an unprotected risk over in Naknek without information as to the value of the different buildings and without more definite information as to the moral risk involved?

A. The moral risk hasn't been brought up yet.

Q. Isn't that something to take into consideration?

A. If it is a moral risk we give consideration to that, yes, but Lloyds have a hundred and sixty thousand dollars on Larry's, Inc., out here outside of town, no fire protection. Does that answer your question?

Q. That is open market coverage?

A. It is open market, and something off contract.

Q. As long as we are going to have a school here on insurance, in order to get open market insurance you have to submit it clear to London and open for bids?

A. Yes.

Q. There isn't anybody that takes all hundred

(Testimony of Joseph Sheahan.)

and sixty [126] thousand dollars, they would take a portion.

A. Say you wanted fifteen thousand dollars off a contract. They would take that.

Q. You say back in January of 1948, while you were still in the employ of Mr. Coffey, you would have and could have bound Mr. Polimeni from the information contained in the letter of April 17th. Will you state by virtue of what authority as a salesman for Mr. Coffey that you could have bound ten thousand dollars on one risk and one company he had authority to bind.

A. I would have put that in four companies, that is the twenty-five hundred dollars, and using that company as a warranty company I would have wired Lloyds and asked them to cover the other seventy-five hundred.

Q. These four companies you would have bound it in in the amount of twenty-five hundred dollars, assuming now that you know and you are testifying from your personal knowledge of the companies, what companies would Mr. Coffey have authority to bind an unprotected risk in, even twenty-five hundred, on January 21st?

A. I say fifteen hundred or twenty-five hundred.

Q. What four companies?

A. Let's make it twenty-five hundred. Philadelphia Fire & Marine, Canadian Fire, the General Insurance Company of America, Fidelity & Guaranty Fire. There is four.

Q. Is it your testimony that when you left there

(Testimony of Joseph Sheahan.)

in January [127] that the Philadelphia Fire Insurance—that Mr. Coffey had binding authority, that he could have bound them to the tune of twenty-five hundred dollars on an unprotected risk in Naknek?

A. I think so. One of the four would have taken twenty-five hundred and that is all we need to wire Lloyds.

Q. One of the four? A. Yes.

Q. Would you have told Mr. Polimeni he was bound without finding out which one of those four would have taken it?

A. I would have known at that time. It has been quite awhile since I have been there. I would have known then which company would take it.

Q. What you are testifying now to is that he had at least four companies and you are sure one of them would have taken an unprotected risk, but you don't know which one?

A. He had more than four.

Q. You take Frank Burns. They might have had five companies under Frank Burns. Would they be all under the same authority under Frank Burns?

A. No. Different companies have different practices. A general agent like Frank Burns reflects the attitude of the companies it represents.

Q. Take Cravens, Dargan & Company itself. Probably an agent would have several companies handled through Cravens-Dargan but [128] Crav-

(Testimony of Joseph Sheahan.)

ens-Dargan would set the policy with the local agent here?

A. No, the companies tell Cravens-Dargan what they want to do. They are the general agents.

Q. I herewith hand you a copy of a letter, and being an insurance man I will just ask you to go over that and if you want to change your answer.

A. No, I won't change my answer on the basis of this one letter from one company, that is Cravens-Dargan.

Q. Isn't it true that Cravens-Dargan have a number of insurance companies?

A. Oh, yes. They have some like the Sun Insurance Company, who write fifteen hundred dollars on this and that, and not very many companies——

Q. They are not a very big outfit, Cravens-Dargan?

A. Cravens-Dargan are not big themselves.

Q. They are about the biggest outfit on the Pacific Coast.

A. No, I think not. This letter refers to Beaudin doing business as the Five Fifteen Club and this particular company don't want any coverage on bars.

Q. Is that question discussed?

A. "You know this type of occupancy has always been considered borderline as far as fire insurance is concerned. At the present time we understand that due to a great drop in business the moral hazard is increasing rapidly. Therefore Mr. Cravens has made a strict ruling that we are to write no

(Testimony of Joseph Sheahan.)

night clubs, [129] clubs, bars, or unprotected restaurants. We are very sorry and so forth.”

Mr. Nesbett: What is the date of it?

Mr. Renfrew: January 23rd, 1948.

Q. That is right after, that is the day after you left Coffey? A. Yes.

Q. Unprotected means unprotected fire areas?

A. In view of this letter we wouldn't have wired Cravens-Dargan.

Q. If you had been there on the 17th of April, when the application came in——

A. Just a moment.

Q. Sure.

A. That was Cravens-Dargan's own idea of underwriting. I don't go out after bar business, but I do have the Denali Bar and I have Fred Mayer.

Q. I submit that is not answering my question.

A. This is just their idea of underwriting, but other companies do take the bars. I have the Frontier Bar. I have Larry's Inc. I have the Anchorage Liquor Store.

Q. You are doing a whale of a business, but it doesn't interest us in this particular instance.

A. I am telling you that this is their own idea and it doesn't——

Q. The same is true of agents, isn't it? One agent will [130] keep the better business and keep the same business for twenty-five years?

A. Yes.

Q. And another would be not so careful and his business would fall off? A. Yes.

(Testimony of Joseph Sheahan.)

Q. And didn't this happen to you just recently?

A. Yes it has.

The Court: We will recess at this time until 2 o'clock.

(Whereupon, at 12 o'clock noon the court recessed until 2 o'clock the same day.)

Afternoon Session

The Court: You may call your next witness.

Mr. Nesbett: We had Mr. Sheahan on the stand, I believe, Your Honor.

The Court: Very well. He may resume the stand.

JOSEPH SHEAHAN

being previously called as a witness on behalf of the plaintiff resumes the stand and testifies as follows on

Further Cross-Examination

By Mr. Renfrew:

Q. Mr. Sheahan, I believe that you testified this morning [131] that if you had received the letter of April 17th as an agent and it contained the information that it does contain in spite of the fact that it didn't say how much on any particular building that nevertheless you would have attempted to bind that by advising the customer and wiring outside. Is that the gist of your testimony?

A. Yes, but I certainly would have written the same type of letter Mr. Coffey wrote to get the proper information.

(Testimony of Joseph Sheahan.)

Q. When you say you would have bound you would have bound subject to authority from the company to bind?

A. No, I have authority from the company to bind.

Q. Well, I am asking you if you did not have the authority would you have done it anyway?

A. Oh, no. If I hadn't had authority I most certainly would not have bound it.

Q. If you couldn't have bound ten thousand dollars worth of insurance, or whatever the application called for, by virtue of lack of authority that definitely would have governed your action in the matter?

A. Naturally.

Q. You don't know whether Mr. Coffey had authority or not on April 17th to bind?

A. On April 17th, no, I don't.

Q. You had severed your connection in——

A. January. [132]

Q. In January I believe you testified?

A. That is right.

Q. And you examined that letter which was dated January 23rd, 1948, from Cravens, Dargan & Company, which clearly advises you that at least the companies Cravens-Dargan represented had pulled out of the business insofar as unprotected areas were concerned two days after you left Coffey's office?

A. That is true.

Q. I believe you also testified, Mr. Sheahan, that the judgment of the agent played an important part

(Testimony of Joseph Sheahan.)

in the placing of insurance, or the action of an agent with regard to telegraphic binders and so forth?

A. That is true.

Q. You will recall that I at one time asked you to bind something in Naknek? A. Yes.

Q. And you did bind it? A. That is right.

Q. You recognize that was a dwelling house?

A. I thought it was a store and dwelling house. I don't remember.

Q. You know it wasn't a liquor store?

A. I don't know. You changed your mind. I told you it would be covered, but we didn't go any further with it.

Q. Now, if you were an agent and you had received the letter [133] of the 17th and if you had had a previous experience with the applicant that he had had one fire loss would that have influenced you any?

A. Not if that was an honest fire, no.

Q. Supposing he had had two losses?

A. That wouldn't make any difference.

Q. As a matter of fact, don't some companies—aren't they a little reluctant to reinsure a man who has had—— A. If they——

Q. Just a moment, till I ask the question. Are some companies reluctant to reinsure when a man has had two in a short time?

A. Suspicious fires, yes, and I wouldn't even refer one to a company.

Q. Did you know that Mr. Polimeni had had

(Testimony of Joseph Sheahan.)

two fire losses, one over at Chignik and one at Naknek? A. Never heard it.

Q. Don't you think an agent would stick his neck out by binding something like that?

A. I should consider it.

Q. The Cravens Dargan Company, I believe you mentioned this morning, had a little company, the Sun, that takes fifteen hundred dollars?

A. I believe they have.

Q. I believe you know that Cravens-Dargan have nothing to do [134] with the Sun?

A. I think Swett & Crawford have that.

Q. Then you were in error?

A. I was, an honest error, yes.

Q. You mentioned you were embarrassed and it was with great reluctance you made these statements. As a matter of fact, you were discharged by Mr. Coffey?

A. No, sir. I never was discharged by Mr. Coffey. I told him I wanted to leave. We were having a ride one day.

Q. It isn't true Mr. Coffey made a special trip up from the States for the purpose of getting the keys from you?

A. If he ever did he didn't tell me so, and further than that I think the reason Mr. Coffey came up here was that my former partner and I the day before rented an office, two days before in the Loussac-Sogn Building, and I thought Mr. Coffey had heard about it.

Q. Mr. Sheahan, we were just on the verge of

(Testimony of Joseph Sheahan.)

discussing the various agents and the companies they are able to keep. Now, an agent that is careful of his risks never loses a company, does he?

A. Oh, yes, he might.

Q. As a general thing it would be extremely unusual circumstances that would cause them to withdraw?

A. Usually, but you might have an agent here in town giving a company a fine business, while Fairbanks has had a disastrous [135] experience. A good many companies have pulled out of the Territory because of the experience in Fairbanks.

Q. Loss experience? A. Loss experience.

Q. They are making money at this time?

A. That is true.

Q. And some agents are able to keep companies for years and years, and others will go out and write anything to make a premium?

A. That is true.

Q. Technically speaking, Mr. Sheahan, under no circumstances could an agent write a policy on three buildings without knowing how much on each building without getting into a lot of trouble, could he?

A. I know several ways of doing it. We can write a lump sum on three buildings by writing the policy with a co-insurance clause or a distribution clause.

Q. Is it your understanding, Mr. Sheahan, that before a policy of insurance could be written there had to be a mutual meeting of the minds between the insured and the insurer? A. Sure.

(Testimony of Joseph Sheahan.)

Q. And such could not be the case if you undertook to insure three buildings you never saw before and set an arbitrary value on each of them when he wanted an overall amount?

A. I will answer in a round about way. [136]

Q. Answer it. A. Alright, starting on——

Q. I say you couldn't have any meeting of the minds if an application came in from a man who said he wanted to insure three buildings for a certain amount of money but you divide it by three and put it on each building?

A. I wouldn't undertake to do that, but I could cover each building temporarily until he gave me the values on each one.

Q. I ask you how you can do that?

A. You can do that merely by referring to the back of your mind the policy, which says that the company will not be responsible for more than the actual value of the property at the time the loss occurs. If the man were trying to obtain too much insurance he wouldn't collect it anyway. I would write a place as remote as Naknek and ask him how much he wanted on each building, but in the meantime I would certainly protect it.

Q. If a man wrote in from Naknek and said he had three buildings he wanted to insure for three thousand dollars you would write back and say you are bound but write back and tell me which building is which?

A. That is true, and how much on each one.

(Testimony of Joseph Sheahan.)

Q. What would you do if the buildings burned down in the meantime?

A. It doesn't make any difference how much insurance you have. [137]

Q. You just stated you could only collect the actual value?

A. Yes, but he can send these amounts then we can insure all of them.

Q. We are not interested in that, Mr. Sheahan. We are following the example of Mr. Polimeni's hypothetical case. If all those buildings were destroyed by fire and you had told Mr. Polimeni in a wire that you were bound you would individually be stuck?

A. No, I have power to bind my companies.

Q. Does your company give you power to bind an arbitrary figure?

A. Yes, to use my best judgment.

Q. And that would be your best judgment?

A. My judgment would be in Naknek to put that ten thousand dollars in four or five companies.

Q. What your judgment would be and what Mr. Coffey's judgment might be might not be the same?

A. That is true.

Q. In one case he might have better judgment and in another case you have better judgment?

A. Yes.

Mr. Renfrew: That is all. [138]

(Testimony of Joseph Sheahan.)

Redirect Examination

By Mr. Nesbett:

Q. Is it common practice to cover him after you receive most of the information necessary?

A. I would have covered him right away, but that is just my way of operating and has no reflection on anyone else's operation.

Q. You have been in the insurance business thirty-two years or thereabout? A. Yes.

Q. Is that the general practice?

A. If a company has confidence in its agents they let them do that, at least you are an agent for the company and if you say yes it is covered it is covered.

Q. Let's go a little further into this. Suppose in Mr. Polimeni's situation this letter of April 17th was received and you have placed twenty-five hundred dollars in a warranty company and wired Seattle for a confirmation on the seventy-five hundred and that confirmation was received the following day, would it be general practice then to issue a policy to Mr. Polimeni?

A. No, it normally would if he was here in town, but Lloyd's issue their own in Seattle. I wouldn't have used Lloyds in this particular case. I would have used about four or five stock companies. [139]

Q. Right after confirmation was received in that situation what date would you put on the policy?

A. The date the order was given.

Q. In other words, it amounts to predating the

(Testimony of Joseph Sheahan.)

policy to the date of the application, does it not?

A. Yes, you get busy in an insurance office and somebody wants insurance today and you don't write the policy for a week. You date it back.

Q. But you have the application and you have agreed that he is bound?

A. Yes, the application is usually a memo, is, oh a memo giving the name and address of the applicant and the amount of insurance he wants.

Q. What is that memorandum called in the insurance world?

A. It is a sheet of scratch paper often times. Sometimes you have printed memos.

Q. Is it called a binder?

A. No, it is called a what? Let's see now, we do have binders too. A binder is temporary. It covers a person usually for thirty days subject to all terms and conditions of the standard fire insurance policy, or until such time prior to the thirty days that the policy could be issued—the policy itself can be issued.

Q. Could a binder have been used in this situation, Mr. Sheahan? [140]

A. I don't know whether Ed had binders. I think he did. I don't know. Some he did and some he didn't, I believe.

Q. Now—— A. A letter can be a binder.

Q. Assuming Cravens and Dargan were not willing to insure risks such as Mr. Polimeni applied for, from your own knowledge of Mr. Coffey's busi-

(Testimony of Joseph Sheahan.)

ness, disregarding Cravens and Dargan as a facility, could you have covered Polimeni otherwise?

A. I don't know. He has, I think, seven very good companies. I would think so, the letter stated that when they received the information they would issue his policies.

Q. What letter do you refer to? The letter of July 23rd?

A. I think so. "Will you kindly give us this information so that we may issue your policies."

Q. To whom was that addressed?

A. Mr. Antonio Polimeni and signed Edward D. Coffey by Grace McConnell. Evidently they could have written it. That is an unfortunate thing to happen.

Mr. Nesbett: May I read this letter, your Honor?

The Court: Is that a duplicate of the exhibit?

Mr. Nesbett: Yes, an exact duplicate of Plaintiff's Exhibit 6. It is a letter dated July 23rd, 1948, addressed to Mr. Polimeni, South Naknek, Alaska. "Dear Mr. Polimeni: [141] Regarding Fire Insurance on Building. We wish to apologize for having mislaid your letter of April 17th giving us the details of the property you wish to have insured. We enclose herewith copy of your letter for reference as we need the following breakdown before we can issue policies. Building No. 1. Please designate a specific amount on the building and a specific amount on the equipment. Building No. 2. Specific amount on building. Building No. 3. Specific amount on building and specific amount on 8 K.W.

(Testimony of Joseph Sheahan.)

light plant. We assume the stock of food supplies is contained within the restaurant and no other building. Will you kindly give us this information so we may issue your policies. Very truly yours, Edward D. Coffey by Grace McConnell," with certain typing notations on it.

By Mr. Nesbett:

Q. Mr. Sheahan, in your association with Mr. Coffey were you authorized to sign policies and deliver them to purchasers?

A. Oh, yes, we did. The girls signed the policies even. In my office the girls who know what they are doing——

Mr. Renfrew: Object as incompetent, irrelevant and immaterial what they do in his office.

The Court: Yes, objection sustained.

Q. Mr. Sheahan, what happened on this request that Mr. Renfrew made that you bind a certain building in Naknek?

A. Oh, he came back from Naknek and asked me to cover a building. [142] I don't recall what it was and I said it is covered and I think nothing came of it. The man was to write to Mr. Renfrew, I believe, or something, and tell him how much he wanted.

Q. Did you tell Mr. Renfrew it was covered?

A. Oh, yes.

Q. Was it covered? A. Yes, it was.

Q. If that building had burned two days later would they have received payment for their loss?

A. Yes, they would.

(Testimony of Joseph Sheahan.)

Q. Is that common practice in the insurance world? A. Yes.

Q. Mr. Sheahan, during your association with Mr. Coffey did he insure bars on occasion?

Mr. Renfrew: Object improper redirect examination.

Mr. Nesbett: It certainly is completely relevant to Mr. Renfrew's cross-examination just before lunch, where he went into the bar situation very thoroughly and so did Mr. Sheahan in his answers.

The Court: Overruled.

A. Yes, he insured bars.

Q. As a matter of fact he insured everything under the sun, didn't he?

Mr. Renfrew: I make the further objection that [143] it is incompetent, irrelevant and immaterial, calling for a conclusion. He don't insure me and I was under the sun once in a while.

Mr. Nesbett: At least you would——

The Court: Counsel shouldn't argue between themselves. It will be sustained as to that question.

Q. Wasn't it the policy of the Coffey agency during the time you were there and since that time that Coffey insures everything—remember? You remember that?

A. Very well. I am reminded of it every day.

Q. That would include bars, wouldn't it?

A. Yes, he insures bars.

Q. Regarding the meeting of the minds, Mr. Coffey, you are familiar with that correspondence

(Testimony of Joseph Sheahan.)

now, consisting of Exhibits 1 through 9, where in your opinion as an insurance man would the meeting of the minds occur?

Mr. Renfrew: Object incompetent, irrelevant and immaterial, calling for a conclusion.

A. I don't—

The Court: I don't get that.

Q. In the course of the correspondence?

The Court: Seems to me you are asking him to pass on a question of law, aren't you.

Mr. Nesbett: Yes, Your Honor, it is true, but the usage in the insurance world is important, isn't it? It [144] becomes a practice.

The Court: If you would ask the witness what kind of a showing is considered sufficient according to the general practice of an insurance agent to enable them to proceed with the issuance of a policy of insurance, even though at a later time they would have to obtain another is competent, but to admit the answer in the form in which you put it calls for an answer in a matter of law.

Mr. Nesbett: I will put Your Honor's question to Mr. Sheahan.

Q. (By Mr. Nesbett): Did you hear His Honor?

A. Yes.

Mr. Renfrew: I didn't.

The Court: Will the reporter read the question, please.

(Reporter reads the last statement of the Court.)

Q. Can you answer that question?

(Testimony of Joseph Sheahan.)

A. Yes, I think insurance goes into effect when a man asks for insurance and the agent says he is willing to write it.

The Court: But you have to know the amount and the property to be insured?

A. Oh, naturally, go out and see the building, but I am talking about insurance in general. If he comes up and says I want six thousand dollars insurance on a dwelling located at [145] such and such location, and I have no knowledge of it and I say it is covered we have a contract of insurance right there.

Mr. Nesbett: That is all, Your Honor.

Recross-Examination

By Mr. Renfrew:

Q. Would your answer be the same, Mr. Sheahan, whether or not the agent had the authority?

A. Oh, no. I think an agent that exceeds his authority is getting himself in an awful predicament.

Q. And you stated that you felt, if my recollection of your testimony is correct, that the insurance was in effect when a customer asked an agent for coverage and the agent says OK I will write it for you?

A. Yes.

Q. Would you say that would be the case if the agent didn't have the authority to bind?

A. An agent does have authority to bind. A

(Testimony of Joseph Sheahan.)

broker does not. An agent directly represents an insurance company. A broker doesn't, he goes out and places insurances with various companies, but when you make an agency agreement with a company it is a legal agreement, it is a contract and along with it comes a line of various risks the company is willing to take and the limit they are willing to go on protected and unprotected risks. You are an agent for the company. You sign policies [146] for them.

Q. You are through now? A. Yes.

Q. I will ask you the same question over again and see if you can confine your answer to the question. A. I answered the question.

Q. Yes, but we don't need decisions. If, as you indicated, in your testimony, a customer wrote in and asked for some insurance and the agent, such as yourself, or Mr. Coffey, wrote back and said you are insured, would he be insured if you didn't have authority, if your company had limited you in your authority so you didn't have the authority?

A. I would have put it in two companies then, or three.

Q. In other words, if you don't have authority you couldn't bind insurance?

A. I can't bind without authority.

Q. But you could make yourself personally responsible by sticking your neck out? A. Yes.

Q. You would make yourself personally responsible? A. Yes, that is true.

Q. One further question. In all your thirty-two

(Testimony of Joseph Sheahan.)

years of experience did you ever hear of an agent that turned down a request?

A. Oh, yes, you bet. [147]

Q. Then it is my understanding there is no duty on an agent to issue insurance policies just because a man makes an inquiry?

A. Heavens, no, we turn down risks right along.

Mr. Nesbett: Just a moment, I object as any further answer——

The Court: The witness has the right to explain his answer if the answer is the kind that requires explanation. If you wish to explain your last answer you may do so.

A. I think I finished that. I have seen lots of risks turned down, yes, rooming houses with chattel mortgages on them and things of that kind.

Q. Now, Mr. Sheahan, you have stated that in your opinion the insurance is in effect, providing the agent had the authority when the agent says you are covered?

A. That is usually the expression. You are covered right now.

Q. And that leaves nothing left to be done?

A. You usually write an insurance policy.

Q. And a little matter of the policy?

A. Oh, yes, be a lot of fire protection before the premium is paid.

Q. Yes. Now I want you to examine Plaintiff's Exhibit 1. That is the letter—no 1 is the top letter. Read that carefully and see if you feel up to that

(Testimony of Joseph Sheahan.)

time you feel there was [148] any insurance in effect?

Mr. Nesbett: Is that Exhibit 1?

Mr. Renfrew: Yes, that is Exhibit 1.

A. I don't think there is any insurance in effect.

Q. Now, I will ask you to examine Exhibit No. 2.

A. No.

Q. Is there any insurance in effect there?

A. No.

Q. Now, read Exhibit No. 3.

A. I can't see there was any insurance.

Q. There wasn't any insurance in effect then, was there, Mr. Sheahan? A. No.

Q. Now, read Exhibit No. 4. Any insurance in effect there, Mr. Sheahan? A. No.

Q. Your answer is no? A. No.

Q. Now read Exhibit No. 5.

The Court: I don't think the plaintiff claims there was any insurance in effect at any time.

Mr. Renfrew: Alright. Your Honor has allowed him to interrogate this witness as to what he would have done under similar circumstances and I am going to find out just when he would have placed this insurance. [149]

The Court: The witness' testimony on that is all directed to whether or not there was due diligence used in procuring insurance, not on whether or not it was effected, because it never was effected.

Mr. Nesbett: We admit that.

The Court: Particularly in view of plaintiff's

(Testimony of Joseph Sheahan.)

statement that is admitted. It seems it is unnecessary to ask this question.

Mr. Renfrew: Perhaps I misunderstood Your Honor's allowing all this testimony. Certainly Your Honor don't contend this hangs on one man's judgment that he would have done this at that time, but the other man didn't.

The Court: You can, of course, cross-examine him as to the practice of insurance agents, but you are now cross-examining him not on that, but when he considers the insurance here was effected, or whether it was effected at any particular time when it never was in effect.

Mr. Renfrew: Perhaps I can satisfy Your Honor's objection by asking Mr. Sheahan up to the last exhibit you read, which is Exhibit 5, when would you have placed this insurance in effect?

A. When he told me that he wanted six thousand dollars I would have done it, but that is my own opinion.

Q. Then you would have done it?

A. Six thousand dollars, or ten thousand dollars, I would [150] have immediately bound it and sent him a wire.

Q. So that——

Mr. Nesbett: Just a moment——

Q. Go back to the exhibits and tell me on receipt of which exhibit you would have bound the insurance?

A. There is an exhibit here, July 23rd. It is number six, where "we wish to apologize for having

(Testimony of Joseph Sheahan.)

mislaidd your letter of April 17th, giving us the details of the property you wish to have insured. We enclose herewith copy of your letter for reference as we need the following breakdown before we can issue policies. Will you kindly give us this information so we may issue your policies.”

Q. Is that when you would have bound it?

A. No, that is when I think it was bound.

Q. That is when you think it was bound?

A. Yes.

Q. What is the date of that document?

A. July 23, 1948.

Q. And that is when you think the insurance should have gone into effect?

A. That is not when I would have put it into effect. I would have put it into effect when I got his second letter, telling me how much he wanted.

Q. How do you think it was bound then? Do you think there was insurance in this case then?

A. Yes, the man asked for insurance and they say kindly give us this information so we can furnish your policies.

Q. You think that covers actual confirmation?

A. I am not of a legal turn of mind, Mr. Renfrew, and I don't know, but that would be my impression.

Q. Would it make any difference if that letter were written after the fire?

A. Yes, because I think this is the first place they say they actually are going to issue policies.

Q. Then if the fire occurred two or three days

(Testimony of Joseph Sheahan.)

before that it would be your opinion there wasn't any insurance, for whatever it is worth that is your opinion? A. Yes.

Q. Then I take it the letter of the 17th——

A. April 17th?

Q. Yes. That is where you would have gone ahead and written insurance? A. Yes.

Q. Now, would you——

A. I would. Go ahead.

Q. Would you have covered him if you didn't have the authority?

A. No, if I didn't have authority I wouldn't have covered him.

Mr. Renfrew: That is all, Mr. Sheahan. [152]

Further Redirect Examination

By Mr. Nesbett:

Q. If you hadn't had authority to cover him and had wired to your principal and asked for authority to cover him and had received that authority say the day following your request when would you have dated his policy?

A. I would date it the day he ordered it.

Q. A date previous to your receipt of the confirmation? A. No.

The Court: When you say the date he ordered it you don't mean the date you received the letter, but the date of the letter itself?

A. No, I would say—you have stumped me there. Just a moment.

(Testimony of Joseph Sheahan.)

The Court: When a person orders something he orders it when he places the order in the mail.

A. That is right and we would have no knowledge that way of the risk, and that is my personal opinion too, but I would say the man is not covered until we receive the letter, having no knowledge of the risk. It might be a frame sawmill that we wouldn't want to take.

Q. Mr. Sheahan, is it customary in the insurance world to issue policies and make coverage before premiums are paid? A. Oh, yes.

Q. Isn't it true that many premiums are not paid until after [153] a fire occurs?

A. Often times they are not paid before.

Q. The coverage is good nevertheless?

A. Yes, so long as the insured has his policy. There are three ways, the first is to have him voluntarily relinquish the policy and ask for a cancellation, the second is to ask him for his policy for the purpose of cancelling it and the third is to send him notice by mail, giving him five days notice before cancellation becomes effective.

Mr. Nesbitt: That is all, Your Honor.

Mr. Renfrew: No questions.

Mr. Nesbitt: I have another witness, Your Honor, may we have a five minute breather?

The Court: Very well, we will take a recess for ten minutes.

(Short recess.)

(Testimony of Joseph Sheahan.)

Mr. Nesbett: Your Honor, at the time this complaint was drawn up I was under the impression that the two auxiliary buildings were destroyed by fire. I have learned since they were not destroyed by fire. Could I amend the complaint by interlineation?

The Court: Is there any evidence that the auxiliary buildings have not been destroyed?

Mr. Nesbett: Yes.

The Court: All right, then you want to amend to [154] conform to the proof?

Mr. Nesbett: Yes. In Paragraph VII of the first cause of action, line 2, after the words "Paragraph I" I would like to interline and say, "except the two auxiliary buildings."

The Court: You say Paragraph I?

Mr. Nesbett: No, Paragraph VII, after the words "Paragraph I" interline "except the two auxiliary buildings," and the same would apply to Paragraph V of the second cause of action.

The Court: The motion to amend by interlineation is allowed.

Mr. Renfrew: Your Honor, where are you going to interline in Paragraph V?

The Court: After the word "complaint" in the second line.

Mr. Renfrew: I have it now.

The Court: You may proceed.

Mr. Nesbett: Call Mr. Polimeni.

ANTONIO POLIMENI

the plaintiff, being called as a witness in his own behalf, and being first duly sworn, takes the stand and testifies as follows on

Direct Examination

The Court: I notice that the name is spelled in the pleadings as P-o-l-e-m-i-n-i and P-o-l-i-m-e-n-i, which is correct?

Mr. Nesbett: I thought I had it correct.

The Court: Which is the correct spelling?

Mr. Nesbett: I will find something that he wrote on. How did he sign the original of the complaint, Your Honor, the verification?

The Court: It looks like e-m-i.

Deputy Clerk: He signs his name to letters P-o-l-i-m-e-n-i.

The Court: Looks like there is a transposition of e for i. Evidently he signs it P-o-l-i-m-e-n-i.

Mr. Nesbett: Your Honor, Mr. Polimeni, as Mr. Smith said, has a speech impediment, and he is very deaf. I was wondering if I could approach the witness closer than usual, and on occasion it is hard for him to understand the question. He can speak in a dialect that Mary Bistro understands, and I wondered if she could be used as an interpreter.

The Court: Do you object to the use of an interpreter?

Mr. Renfrew: I do, Your Honor, because Mr. Smith, who is very familiar with the circumstances,

(Testimony of Antonio Polimeni.)

and a life long friend says he has no difficulty whatever. He is in the Court Room. Let him do it.

Mr. Nesbett: I don't believe he testified he had no difficulty, said he could eventually get the meaning.

The Court: In view of the objection, I think we should attempt to get along without an interpreter and if it becomes necessary we can use an interpreter.

Mr. Nesbett: Then, Your Honor, can Mr. Smith come up closer and speak to Tony in a loud voice so we can get the idea over to him?

The Court: So long as he will speak in the English language.

(Mr. Smith approaches the witness stand.)

Q. (By Mr. Nesbett): What is your full name, Tony? A. Name Tony Polimeni.

Q. Antonio Polimeni? A. Polimeni, yes.

Q. Where do you live?

A. I live Naknek.

Q. How long have you lived in Alaska?

A. 1931. I been outside three times.

Q. You been outside three times since thirty-one? A. 1938. 1939.

A. All righ, what is your business, Tony?

A. Fisherman.

Q. You have any other business? [157]

A. Cook.

Q. How long have you fished?

A. I fished today thirty-seven years—I got—

(Testimony of Antonio Polimeni.)

Alaska Packers. I been around. I started 1912——

(Reporter's Comment: The witness, Antonio Polimeni, throughout his testimony, on both direct examination and cross-examination, is inaudible and unintelligible. The witness apparently answers the questions at length and with emphasis although only a very few of the sounds he makes are distinguishable as words.)

Q. (By Mr. Nesbett): How long have you fished in Alaska? A. Thirty-seven years.

Q. You lived in Naknek since what date?

A. Forty-two. I live with Billy Regan and take care of kids.

Q. Did you own a restaurant building in South Naknek?

A. (The answer is completely unintelligible.)

Mr. Smith: He misunderstands that.

Q. Did you own a restaurant in South Naknek?

A. No——

Mr. Smith: You have restaurant in South Naknek?

A. Restaurant, yes. I understand different.

Mr. Nesbett: Maybe if you come up here you can do a better job.

(Mr. Smith approaches the witness stand closer.)

Q. (By Mr. Nesbett): What kind of building was that restaurant in?

A. Thirty by thirty and four room upstairs—five rooms. I fix it up.

(Testimony of Antonio Polimeni.)

Q. What year did you buy that building?

A. That building promised to me in forty-two.

The Reporter: Did you say that building promised to me in forty-two?

A. Yes.

Q. When did you get it?

A. I get it up to—Bill Regan pay Charley Watson so much money——

Mr. Smith: He misunderstands.

Q. What year did you get the building for yourself? A. Started about forty-five.

Q. 1945?

A. Bring the lumber there—not what he want——

Q. Ask him what he did to improve it.

Mr. Smith: I want you to tell how much money you spent on the building and what you did?

A. I can't tell. Lot of money. I got about eight people help me—working on the basement—— [159]

Reporter: What does he say?

Mr. Smith: We don't need their names. Tell what else you do. Did you put lumber in it?

A. Yes, from Alaska Packers, two by four, two by twelve, one by twelve. Make shelf. Make partition——

Reporter: Make what?

A. Partition. Have partition, floor and everything.

Mr. Smith: You put anything in it like furniture—beds?

A. Beds. Yes. I got five beds.

(Testimony of Antonio Polimeni.)

Mr. Smith: What else?

A. I got the motor——

Mr. Smith: Did you have chairs? Tell everything.

A. Chairs, yes.

Mr. Smith: Tell everything you put in you can remember?

A. I got stove shipped down.

Mr. Smith: Tell her (indicating the Reporter). She don't know. You put in stove. Tell the other.

A. I got a stove. My stove just—pipe—stove—stovepipe, stove oil——

Mr. Smith: What else you use in restaurant—glasses or dishes?

A. Glasses. Coffee pots—— [160]

Mr. Smith: How big? Have full basement? Half basement? How big?

A. About eighteen by twenty—put two by six sometimes posts. Inside be ten——

Mr. Smith: Inside line it with ten

A. (Answer unintelligible.)

Mr. Smith: Inside he put ten, floored it with two by twelves.

Mr. Smith: You do any work on the well?

A. Yes, I work on the——

Mr. Smith: How big?

A. About thirty feet before get water, about thirty feet—he went down another twenty-seven feet—pipe in the well. Before it was thirty feet.

Q. (By Mr. Nesbett): Who dug the well for you?

(Testimony of Antonio Polimeni.)

A. Al Ruhl and there was an old man named Johnson that killed himself. Raymond Makerfierf——

Mr. Smith: Can he read the names he has written?

Mr. Nesbett: That is all right.

Q. Where did you get the money to do all this work, Tony?

A. Credit at Alaska Packers and some by cash same place.

Q. I mean to do your building from 1945 to 1948?

A. Alaska Packers. [161]

Q. Did you use your fishing money to do it?

A. (Answer unintelligible.)

Reporter: What was his answer?

Mr. Smith: You use your fishing money?

A. Two years, I think. I make money in the fall. I can't run that place.

Q. (By Mr. Nesbett): Ask him how much that thing was worth when he got through with it.

The Court: I think he ought to be instructed if he is not going to speak loud enough he ought to speak into the microphone.

Mr. Smith: He is nervous.

The Court: Maybe you ought to take the microphone into your hands.

Mr. Smith: He asks how much your restaurant worth, everything?

A. About—dollars.

Reporter: What amount?

(Testimony of Antonio Polimeni.)

Mr. Smith: Fourteen thousand dollars, he says.

Q. Ask him if he owned that building?

Mr. Smith: You owned it?

A. Yes, sure, I owned it—what you call it and you buy the stock like a——

Mr. Smith: I don't care. [162]

Mr. Nesbett: That is enough, Mr. Smith.

Mr. Renfrew: Just what did he say? I want to get the answer.

Mr. Smith: He was also explaining that he owned the building but trying to show how much he improved it at the same time.

A. I can't figure out. I got it here.

Q. Did you ask Mr. Coffey to insure it?

A. Sure, I write to him two-three times.

Q. Who wrote the letters for you?

A. The school teacher.

Q. Did you get any information on it?

A. He send the letters to me and I measure the ground up and——

Q. Did you measure the ground up?

A. Sure.

Q. Who did it?

A. A fellow works at the Alaska Packers, I forget the name.

Q. Did Mr. Ruhl help you? A. Yes.

Q. Did you send that information to Mr. Coffey?

A. No, I don't remember—I got——

Mr. Smith: He says he don't remember.

A. ——to go fish for King salmon.

(Testimony of Antonio Polimeni.)

Q. That is all right, Tony, you are getting off the track. [163]

Reporter: What was his answer?

Mr. Nesbett: I don't think it matters.

Mr. Renfrew: I think it does matter.

Mr. Smith: He didn't give an answer that time. He is getting a little confused.

Q. Did you ask anybody else besides Coffey to insure it? A. No.

Mr. Nesbett: This is a bill of particulars filed in the pleadings, Your Honor.

Q. (By Mr. Nesbett): Tony, look at this list of furnishings. That is right. I will read it to you. Did you have six tables in that place?

A. (Answer intelligible.)

Q. Did you have six tables? A. Yes.

Q. Did you have a dining table? A. Yes.

Q. And a china closet? A. Yes.

Q. Cupboard, you know? A. Yes.

Q. How many dressers did you have?

A. Dressers—yes. Beds and dressers.

Q. You had beds? A. Five [164]

Q. Cots? A. Yes.

Q. You had blanket sheets, pillows and cases?

A. Yes, all that I use.

Q. How much did that cook stove cost you?

A. It was \$700, I think \$700—they come down \$500—

Mr. Smith: You want to know what he said?

Mr. Nesbett: Yes.

(Testimony of Antonio Polimeni.)

Mr. Smith: He said the stove was worth \$700, but they marked it down to \$500.

Q. Who marked it down?

A. (Answer unintelligible.)

Mr. Smith: One bookkeeper said \$700 and the one that replaced him said it would be \$400.

Q. Did you have a hot water tank?

A. Yes.

Q. Did you have a water pump?

A. Automatic.

Q. Automatic? A. Yes.

Q. Al Ruhle (interruption).

A. He fixed that.

Q. How much did that pump cost you?

A. I figure everything there they think to connect it cost [165] about \$225, something like——

Q. Did you have a light plant?

A. (Answer unintelligible.)

Mr. Smith: He had a small one. He bought it from another fellow.

Q. How much did it cost you? A. \$350.

Q. \$350? A. Yes.

Q. Did you have any pots and pans to cook with?

A. Cooking plenty——

Q. Did you have dishes?

A. Dishes—kind for sandwiches—everything.

Q. You had many kinds of dishes?

A. Yes.

Q. You had a beer and wine license, didn't you?

A. I got about sixty cases——

(Testimony of Antonio Polimeni.)

Mr. Smith: You don't understand. You have license for beer and wine?

A. Oh, yes.

Q. You had beer and wine in the place when it burned down? A. Yes.

Q. How many cases of beer did you have, do you know? A. About six cases—six-seven.

Q. Six cases? [166] A. Six-seven.

Q. Did you have any wine? A. Yes.

Q. What kind? A. (Unintelligible.)

Mr. Smith: He said they had any kind of wine. The people liked to buy, so he had any kind of wine.

Q. Did you have any groceries in the restaurant?

A. Yes, from the year before.

Q. Did you have a year's supply?

Mr. Smith: Did you have a year ahead?

A. Yes, I think. I like to get a——

Mr. Smith: How long it last?

A. It last for one year and more.

Q. Tony, did this building burn down?

A. Burned down, yes. I was fishing.

Q. You were fishing? A. Salmon.

Q. Did you close the restaurant down?

A. (Unintelligible.)

Mr. Smith: He said that he stopped running it himself and Al Ruhl commenced running it.

Q. When did you leave?

A. I came back the middle of June—we fished the summer for the red salmon, king salmon——

Mr. Smith: He left two weeks before the red

(Testimony of Antonio Polimeni.)

salmon season and he left about the middle of June, is what he said.

Q. Did Al Ruhl run the restaurant while you were gone? A. (Unintelligible.)

Mr. Smith: He told him to take care of the restaurant and he doesn't know whether he run it or not.

Q. Did Al Ruhl go fishing? A. Yes.

Q. Did he close up? A. (Unintelligible.)

Mr. Smith: He said he closed it up. There was no one there.

Q. Did you go back at any time after it closed and before it burned? A. (Unintelligible.)

Mr. Smith: Before restaurant burn, after you go fishing did you come back, look at restaurant again before it burned down? A. I look at it.

Mr. Renfrew: Did he say he did?

(Reporter reads last answer.)

Q. Tony, did it burn down?

A. All to the bottom.

Q. Did you save anything out of it? [168]

A. No. I got insulation in the other room, plenty insulation, burn down too—

Mr. Smith: He was surprised at something he thought it would burn up too.

Mr. Nesbett: I thought he said he was surprised it could burn up too.

Mr. Smith: He did.

Q. Did you have some money in that basement too?

(Testimony of Antonio Polimeni.)

Mr. Smith: Just a moment. Tony, did you have money in the basement?

A. Yes, two thousand dollars.

Q. Where did you hide that money?

A. Down in the paper.

Q. Paper brick? A. Yes.

Q. Rolls of hardface brick? A. Yes.

Q. Did you save any of that money after the fire? A. (Unintelligible.)

Mr. Smith: No, he looked around and everything was out. He means everything was gone. He said the wine was burned up. He didn't see any wine either.

Q. You know about when that restaurant burned down, the date? A. (Unintelligible.)

Mr. Smith: No, he says he was excited and [169] doesn't know when it burned up.

Mr. Smith: You know what month?

A. I think July. Somebody said 22nd, somebody said 20th, must be 20th.

Mr. Smith: He says it must be the 20th.

Mr. Nesbett: I think that is all, Your Honor.

Mr. Renfrew: May I see the exhibits?

Deputy Clerk: Yes.

Cross-Examination

By Mr. Renfrew:

Q. Tony, can you read English?

A. I read but I can't understand everything, a little bit.

(Testimony of Antonio Polimeni.)

Q. You remember when you talked to the school teacher about writing to find out if you could get insurance?

A. I remember writing. I can remember it—17th——

Mr. Smith: That he all right. He is just going into the dates now. He says he can remember, but he can't remember exactly when.

Q. Didn't he say he could remember the 30th of March, or the 17th of April, isn't that what he said? A. (Unintelligible.)

Q. What I want to know is do you remember going to the school teacher and having the school teacher write Mr. Coffey to see if you couldn't get insurance? [170] A. (Unintelligible.)

Mr. Smith: Yes, that is right, but he don't remember the date.

Q. All right, now, did you hear anything from Mr. Coffey? A. He write one time.

Q. One time?

A. One time or two, I can't remember. One time I measure the ground.

Q. You remember receiving any more letters from Mr. Coffey, or just one letter?

Mr. Smith: He has answered that already. He answered one time and another time—two. He just said that previously.

Q. You remember receiving more than two letters from Mr. Coffey? How many altogether?

A. I can't remember—two——

Q. Are you sure?

(Testimony of Antonio Polimeni.)

A. I can't remember——

Q. His answer is I can't remember?

Mr. Smith: He says I can't remember, a little bit more maybe, I don't know.

Q. Can you read that, Tony?

Mr. Smith: You read out loud, Tony.

A. In a reply to your letter March 30 I wish to the—fire—one hundred pound—— [171]

Q. Now, do you understand that?

A. Three hundred dollars. Yes.

Mr. Renfrew: No, I know you understand it (to Mr. Smith), but I don't want him to say something he doesn't understand.

Q. You know what that means?

A. The restaurant——

Q. When you got a letter from Mr. Coffey what did you do with it?

A. I measure the ground. I measure the school house——

Mr. Smith: He is very much confused now.

Q. Are you, Tony? A. (Unintelligible.)

Mr. Smith: It would take a full day to explain each letter to him.

Q. When you got these letters did you get them in the post office? A. Yes.

Q. Is there a post office in South Naknek?

A. South Naknek.

Q. There is a post office there? A. Yes.

Q. Did you go there to get your mail?

A. Somebody bring it. [172]

(Testimony of Antonio Polimeni.)

Q. Did you go to the post office to get these letters?

A. Maybe I get them myself. I can't remember.

Q. What did you do with the letters when you got them? A. I read——

Q. You read it yourself?

A. No, somebody reads.

Q. Somebody reads it to you? A. Yes.

Q. You know who read those letters you got from Mr. Coffey?

A. I can't remember. Maybe——

Mr. Smith: He think Al Ruhl read the letters he got from Mr. Coffey, measuring the ground and the distance to the post office and the school house.

Q. Now, do you remember writing to Mr. Coffey in June, and asking him why he didn't answer you and whether or not you had any insurance?

A. Can't remember.

Q. You don't remember that? Look at this piece of paper here.

Mr. Smith: You read and see if this was letter you send. Maybe you could read the letter out loud and see if you could remember it.

The Court: Is this his signature?

Mr. Smith: Yes.

Q. Did you sign that? A. I signed. [173]

Q. Have you read it now? A. I do.

Q. Read what it says?

A. "Mr. Coffey. I have your letter before concerning—for restaurant and have you——no reply.

(Testimony of Antonio Polimeni.)

I would like you to help from you and——premium of the policy.”

Q. You are not having any trouble reading that, are you? A. Words——.

Q. Read that alright, can't you?

A. I can't think.

Q. You mean you can't understand the words in it? A. (Unintelligible.)

Q. You——

Mr. Nesbett: Let him answer.

Reporter: What was his answer?

Mr. Smith: He can read it, but can't understand it. He says he is not a lawyer.

Mr. Renfrew: I think he is the best lawyer in the court room, that is what I think.

Q. (By Mr. Renfrew): Did you go to the school teacher? A. I went to the school, yes.

Q. Did you go to the school teacher and ask her to write this letter?

Q. Did you say you were writing to Mr. Coffey, wanting to [174] know why he hadn't replied to your letter?

A. Why he didn't write to me before it was too late——.

Mr. Smith: He says before it is too late.

Q. What do you mean before it is too late?

A. It——

Q. You say——

Mr. Nesbett: Let him answer.

Mr. Smith: Don't let him get you excited. Take

(Testimony of Antonio Polimeni.)

your time. A. (Unintelligible.)

Mr. Smith: He said——

Mr. Renfrew: Strike all that.

The Court: I will have to understand him first. I don't know what he said.

Mr. Smith: He says he is not a politician and I have forgotten part of it now.

The Court: In so far as he said anything about his not being a politician it will be stricken.

Mr. Nesbett: Do you think he is, Your Honor?

Mr. Smith: What did you want to ask him?

Q. I wanted to know what he meant by he wanted Mr. Coffey to answer before it was too late.

A. Somebody jealous alright. Where I come from——.

Mr. Smith: He says where he comes from you have to protect your business. The people get jealous. [175]

Mr. Nesbett: Ask what he means by too late?

Q. (By Mr. Renfrew): Just a moment, Tony. You tell us what he said and I will see if it had anything to do with it.

Mr. Smith: He said that was business to have it insured and from where he comes from where people are drunk he has to protect himself.

Q. Did you have a house that burned up down at Egegik? A. Yes.

Q. That burned up? A. Yes.

Q. Insured? A. Yes.

Q. You had an airplane that burned up?

A. Yes.

(Testimony of Antonio Polimeni.)

Q. You think somebody sets your things on fire over there? Is that why you wanted to insure them?

A. I don't know.

Q. When you say you want to hurry up and insure it before it was too late——

Mr. Smith: He says in the type of business——

Mr. Renfrew: He didn't say anything about the type of business. He said the drunks make trouble. That is what he said.

Mr. Smith: Yes. [176]

Mr. Renfrew: Didn't he do that?

Mr. Smith: You talk to him.

A. Maybe make trouble——.

Q. Did you think you were getting insurance for somebody breaking something?

A. No——.

Mr. Smith: He said no.

Mr. Renfrew: He sure did.

Q. How many buildings did you have there, Tony? A. South Naknek?

Q. Yes. A. Restaurant and ——.

Q. You had the restaurant building?

A. Yes.

Q. You had the restaurant building?

A. Yes——.

Q. Did you have any other building?

A. Yes, I got a little——.

Mr. Smith: Before that he said another building, a restaurant and a toilet.

Q. Did you have a building for the light plant?

(Testimony of Antonio Polimeni.)

A. I got the light plant about a hundred feet that way (indicating).

Q. Was the light plant in that building?

A. The building——. [177]

Q. Was the light plant in there?

A. (Unintelligible.)

Mr. Smith: No.

Mr. Renfrew: He didn't say no.

Mr. Nesbett: He doesn't understand. I used the interpreter that he wanted and it worked out alright.

Mr. Renfrew: I am perfectly willing to use the interpreter, but I can understand English.

Q. (By Mr. Renfrew): You want to take five minutes to think this over?

Mr. Smith: You want me to ask——

Mr. Renfrew: I don't want you to ask.

The Court: I think all remarks of counsel should be addressed to the Court.

Mr. Renfrew: I don't like to be interrupted. May I try to proceed in an orderly fashion, and if I get out of bounds the Court can watch me.

The Court: Go ahead.

Q. You had a building you put the light plant in? A. Little building, yes.

Q. Did you have the light plant in it?

A. Yes.

Q. Was the light plant in it when the house burned down? A. I got the porch——. [178]

Q. It was on the porch? A. Yes.

(Testimony of Antonio Polimeni.)

Q. Was it ever in that other little building?

A. Nothing——.

Reporter: What was the answer?

Mr. Smith: Nothing.

Q. You remember when the school teacher wrote this letter? The school teacher wrote this letter too? A. Yes.

Q. This is the letter of April 17th. You remember this letter? A. Yes.

Q. Now, here this says an eight by ten building, fifty feet from main building. This building is used for housing light plant providing electrical power for restaurant and used as a repair shop. Now, you sent that letter to Mr. Coffey, didn't you? You remember that? A. Yes.

Q. Now, was the light plant in there, or wasn't it? A. It was on the porch.

Q. It wasn't in the building then?

A. No, outside on porch.

Q. Do you remember getting a letter from Mr. Coffey after you wrote and wanted to know why you didn't hear from him before it was too late? You remember getting a letter from him after [179] that? A. Yes.

Q. You remember that? A. Yes.

Q. In that letter did he tell you that he didn't get your letter of April 17th? A. 17th——.

Q. You remember receiving a letter from him?

A. 17th——.

Q. When he said he didn't get your letter of the

(Testimony of Antonio Polimeni.)

17th? A. That letter from me the 17th——.

Q. You remember getting a letter telling you he hadn't received your letter, your letter of the 17th, and asking you to go measure again?

A. (Unintelligible.)

Reporter: What is his answer?

Mr. Smith: He got the letter there in the middle of June. He isn't quite sure in his mind.

Mr. Renfrew: Just a minute, Your Honor, the interpreter made a statement just now. It appears to me——

Mr. Smith: Well——

Mr. Renfrew: Just a minute, Bill. It appears the witness does know, he says he got the letter from Mr. Coffey saying he didn't get the letter.

Mr. Nesbett: I am sure he hasn't the faintest idea what is meant.

Mr. Smith: You said did he get the letter and he said yes, and he didn't even know what letter you referred to.

Mr. Renfrew: I thought he understood it very well, at least that is my impression of what he said.

Mr. Nesbett: May I suggest that the interpreter be used and the questions be made short and simple.

The Court: If the witness may misunderstand your questions and therefore make answers that will mislead the jury I think we should use the interpreter.

Mr. Renfrew: I am perfectly willing to use an interpreter, Your Honor, but the only thing Mr.

(Testimony of Antonio Polimeni.)

Smith does instead of interpreting is add. He answers the way he knows the witness should answer.

Mr. Smith: No.

Mr. Renfrew: Well, you wanted him——

Mr. Smith: Certainly I wanted him, but I wanted him honestly——

The Court: I must again warn counsel that they must address all remarks to the Court, or we will have to add to Fund “C” here. Maybe in view of the remarks made about Mr. Smith he should be sworn as a regular interpreter.

Mr. Smith: May I ask a question about it?

Deputy Clerk: Hold up your right hand and be sworn please.

(Mr. Smith holds up right hand.)

Deputy Clerk: You do solemnly swear that you will well and truly interpret the Italian testimony of this witness given in this cause, interpreting the Italian——

(Mr. Smith lowers right hand.)

Deputy Clerk: ——into English and the English into Italian to the utmost of your ability. So help you God.

Mr. Smith: I don't think I should do this. I don't understand Italian.

The Court: No, I don't think you should.

Deputy Clerk: Your Honor, what should I use?

Mr. Renfrew: I don't want to ask any more questions.

(Testimony of Antonio Polimeni.)

Mr. Nesbett: Mr. Smith, would you help me out.

Redirect Examination

By Mr. Nesbett:

Q. I will ask about the Egegik fire.

Mr. Smith: He wants to know about your house in Egegik. You tell him what happened.

A. (Answer unintelligible.)

The Court: Now, now.

Mr. Smith: No, no different thing. Remember you have house in Egegik. What happened to that?

A. Burn up. [182]

Q. Where were you when that happened?

A. Naknek.

Q. You were in Naknek when the house burned in Egegik? A. Yes.

Q. Did you have that house insured with Coffey?

A. Yes.

Q. Did he pay you?

A. Yes, after—three—.

Mr. Smith: He said I write letter three times. Got to wait. I ask him I need the money. I am broke. I want to fix my house.

Q. Was anybody living in that house when it burned? A. Two—and two kids.

Mr. Smith: Two men and two children—kids.

Q. Did you let them live there?

A. (Answer unintelligible.)

Reporter: What was his answer?

Mr. Smith: He said they could stay there. He

(Testimony of Antonio Polimeni.)

said they were supposed to pay rent, but they didn't pay rent nor nothing.

Q. How much did you get from Coffey on that place?

A. Just the kitchen—three or four hundred fifty three—.

Q. How much?

Mr. Smith: Four hundred fifty three dollars and some cents. He just got paid for the kitchen.

Q. Did you have an airplane, Tony?

A. Yes.

Q. Did you buy it? A. I bought it.

Q. For whom? A. For Allen McGregor.

Q. Did you fly it? A. (Unintelligible.)

Mr. Smith: He flew it. He told me he could fly. I don't know. He mean't I don't know if the man could fly or not.

Q. Did you fly with him?

Mr. Renfrew: You ask him if he rode with him.

A. He take me down to Egegik.

Q. Did that airplane burn up?

A. I come back to Naknek—.

Mr. Smith: He took me down to Egegik and back to Naknek and told me he would be back Wednesday or Thursday.

Q. Then what happened?

A. (Answer unintelligible.)

Mr. Smith: He said that it caught fire when he was warming up the engine.

Q. Did it burn up? A. Yes. [184]

(Testimony of Antonio Polimeni.)

Q. Did you have insurance with Coffey on that?

A. Yes——.

Mr. Renfrew: What was his answer?

Mr. Smith: I didn't understand it either.

Mr. Renfrew: Did he say just in time one week?

Mr. Smith: He said he got the insurance check on time.

Mr. Renfrew: I thought he said or——

Mr. Nesbett: Wait a minute.

Mr. Renfrew: ——he would have lost the whole business.

Q. (By Mr. Nesbett): Did Coffey pay you?

A. Yes.

Q. How long did it take?

A. About a month.

Q. How much was it?

A. Twenty-five hundred dollars.

Q. Where were you when the plane burned up?

A. I was at——.

Q. How much did the plane cost?

A. Thirty three hundred——.

Mr. Smith: He said paid thirty three hundred dollars. He says Bill Renfrew knows how much he paid for it.

Mr. Renfrew: Three thousand dollars: You want [185] me to be sworn?

The Court: Again I have to warn counsel.

Mr. Nesbett: That is all, Your Honor.

Mr. Renfrew: Would you interpret some more, please.

(Testimony of Antonio Polimeni.)

Recross-Examination

By Mr. Renfrew:

Q. Ask him when he insured his house in Egegik?

A. Oh, three weeks before, a month before you come here.

Mr. Smith: He said three weeks or a month before I came to Naknek.

Q. Will you ask him the year?

Mr. Smith: What year?

A. (Answer unintelligible.)

Mr. Smith: He said maybe four years ago, but can't remember.

Q. Ask him if it wasn't in January of 1947?

Mr. Smith: What was that again?

Q. Ask him if it wasn't in January, 1947?

Mr. Smith: He says to ask you if it was January, 1947? A. I think wintertime——.

Mr. Smith: He said it was in the winter. He can't remember whether it was January or February, what month. He remembers the house burned on Wednesday. [186]

Q. Ask him when he signed the proof of loss that Mr. Coffey sent to him before he could be paid.

Mr. Smith: When Mr. Coffey send you paper so you could get paid for house, you remember when you signed that paper? A. No.

Mr. Smith: Your house burned down?

A. Yes.

(Testimony of Antonio Polimeni.)

Mr. Smith: You write Mr. Coffey?

A. Yes——.

The Court: I wonder if this could possibly be error.

Mr. Renfrew: Your Honor allowed it.

The Court: The jury is instructed right now not to consider the delay in payment for the loss of the house in Egegik, which has nothing to do with this case.

Mr. Renfrew: We have no further questions then, Your Honor.

Mr. Nesbett: That is all. Defendant rests, Your Honor, or plaintiff rests.

Mr. Renfrew: I wish to make a motion, Your Honor, and I wish to be heard extensively.

The Court: In the absence of the jury?

Mr. Renfrew: Yes, in the absence of the jury.

The Court: You mean it will take sufficient [187] time to warrant excusing the jury for the day?

Mr. Renfrew: I would say it would, Your Honor.

The Court: Very well, the jury is excused until ten o'clock tomorrow morning.

(The jury leaves the room.)

The Court: Does counsel wish to have their arguments reported?

Mr. Renfrew: Not necessary so far as I am concerned at all. It will be confined principally to reading from a brief.

Mr. Nesbett: We will waive.

The Court: You will be excused. [188]

(Testimony of Antonio Polimeni.)

United States of America

Territory of Alaska—ss.

Certificate

I, Lorraine Clarke, the Official Special Court Reporter for the District Court of the United States, Third Division, Territory of Alaska, hereby certify the above and foregoing 188 pages to be a true and correct transcript of the proceedings had in the above-entitled matter in said court at the time and place as set forth.

/s/ LORRAINE CLARKE.

April 20, 1950

The Court: Roll of the jury may be called.

The Clerk: They are all present, Your Honor.

Mr. Renfrew: I wish to call Mrs. McConnell.

GRACE McCONNELL

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Will you state your full name, Mrs. McConnell?
A. Grace McConnell.

Q. And you are employed by the Coffey Agency in Anchorage?
A. Yes, I am.

Q. How long have you been so employed?

A. Since 1947.

Q. What is your capacity?

A. Office manager.

(Testimony of Grace McConnell.)

Q. Have you been engaged in general insurance for a period of time?

A. For twenty years.

Q. And what has been your training and what fields, Mrs. McConnell?

A. As underwriter, not as salesman.

Q. And just explain, if you will, the difference between [191] the underwriting parts of your training and the salesman part, what are the different duties—what are your different duties?

A. An underwriter has to pass on the technicalities, the acceptance and rejection of good risks and bad risks.

Q. And where were you employed prior to your connection with the Coffey Agency?

A. In Portland, Oregon, in about four or five offices—branch offices—special agent, local agent and general agent. I was office manager for a general agency for twelve years.

Q. In your capacity as office manager for the Coffey Agency, did you have any connection with the application and the various correspondence that you have heard discussed here in this case with regard to Mr. Polimeni?

A. Yes, I initiated the file by quoting the rate.

Q. I wish to hand you the exhibits which have been offered, I think they go from 1 to 9, are these chronologically correct?

The Clerk: They were the last time I looked at them.

(Testimony of Grace McConnell.)

By Mr. Renfrew:

Q. I hand you Plaintiff's Exhibits 1 through 9, Mrs. McConnell and ask you if you will just briefly glance at Exhibit No. 1 and tell me what that is?

A. That is an inquiry as to rates for fire insurance.

Mr. Renfrew: At this time, Your Honor, I believe [192] we should read these documents to the jury. This is dated South Naknek, Alaska, March 30, 1948, addressed Edward D. Coffey, Anchorage, Alaska. Dear Sir: At this time I am writing concerning an insurance policy covering my new restaurant in South Naknek, Alaska, which houses private living quarters on the second floor and the restaurant on the first floor. Please inform me as to the type or types of policies necessary to insure the building and all fixtures including automatic pump, light plant, dishes, meat saw and food supplies. What form of policy is necessary to cover a seasonal beer and wine supply brought in in the fall valued at \$3,000. Sincerely, Antonio Polimeni.

Now, that letter was received in your office on what date, Mrs. McConnell?

A. On April 6th.

Q. On April 6th. Now, I will ask you if from the information contained in that letter were you able to quote a definite rate?

A. I was able to quote a rate on a building he described.

Q. In that letter you will recall a statement to

(Testimony of Grace McConnell.)

the effect that there was a light plant, would that affect the rate in any way?

A. There is a different rate on a light plant than on a restaurant.

Q. Did you take that into consideration when you made a [193] reply to that letter?

A. The letter of April 9 quotes a rate of \$3 on the building occupied as a restaurant.

Q. I call your attention to Plaintiff's Exhibit 2 and ask you if that was the reply which you sent in connection with the Exhibit 1 which I just read?

A. That is right.

Q. I wish to read this letter to the jury, Your Honor. This is dated April 9th addressed to Mr. Antonio Polimeni, South Naknek, Alaska. Re fire insurance on building occupied as restaurant and dwelling. Dear Mr. Polimeni: In reply to your letter of March 30th, wish to advise that the fire insurance rate on both building and contents is \$3 per one-hundred of insurance for one year. It is necessary to place a specific amount of insurance on the building and a specific amount on equipment and supplies. Beer and wine would be insured under stock. We enclose form which indicates how the insurance is divided. If insurance is ordered we will need to have a description of the location of the property. If the land is unsurveyed so you cannot give us lot and block numbers please advise how far distant your building is from the Post Office or the public school building and also advise the construction and occupancy of any buildings

(Testimony of Grace McConnell.)

within 100 feet of your building. We trust this is the information you desire. Yours very truly, Edward D. Coffey. By, and the By is in blank [194] because this is a carbon copy.

Now I will ask you, Mrs. McConnell, when you sent that letter you requested certain information, would the information furnished you have possibly increased or decreased your rate quotation?

A. Yes, it would have changed it.

Q. Supposing for the purposes of illustration only that when you asked for a description of the buildings within one hundred feet, that Mr. Polimeni had of notified you that there was a gas storage tank house within fifty feet of the building or a powder house with powder supplies within a certain distance would that have increased the rate?

A. Yes, explosives within one hundred feet of frame construction constitute an increase in rate.

Q. Now, I call your attention to Plaintiff's Exhibit No. 3 and ask you if you recognize that as a document received in your office?

A. Yes, it was received April 24th.

Q. And the date of that instrument is April—

A. —the 17th.

Mr. Renfrew: I wish to read this to the jury, Your Honor. This is South Naknek, Alaska, dated April 17, 1948. Addressed Edward D. Coffey, Anchorage, Alaska. Dear Sir: Having received your reply to my inquiry concerning my insurance I am supplying necessary description of the property and equipment. The main restaurant building is

(Testimony of Grace McConnell.)

one thousand feet from the South Naknek Territorial School Building and approximately 300-hundred feet from the Post Office. (1) Main building thirty by thirty. Restaurant—two-story building housing booths, counter, kitchen, pastry room, laundry on the first floor, with five rooms on second floor for living quarters for owner and hired assistants, and basement eighteen by twenty feet providing storage capacity for restaurant supplies and special compartment for automatic pump connected to the well enclosed within the building with descent from kitchen. Attached to kitchen and pertaining to service thereof are kitchen range, hot and cold water tank, and sink. (2) Eight by ten foot building fifty feet from main building. This building is used for housing light plant providing electrical power for restaurant and used as a repair shop. (3) Six by eight foot. Twenty feet from main building. Separate restrooms with shields for entrances. These buildings mentioned have tin roofs and are to be insured en masse for \$6,000. Equipment and supplies: Furniture—five beds complete with all-season bedding, three wardrobe bureaus with clothing of owner and assistant, six chairs, two tables, one sewing machine, and one phonograph (electrical). Fixtures: Washing machine, electric iron, complete line of china and silverware for serving 100 capacity, and bowls, platters and beer and wine glasses. Machinery: Gasoline engine. Automatic water pump, 8 k.w. light plant. The furniture, [196] fixtures, and machinery are to be insured for fifteen hun-

(Testimony of Grace McConnell.)

dred dollars. Stock: Complete line of food supplies for restaurant operation for six months including small amounts of beer and wine. The stock is to be insured for \$2500. I trust this is the complete and necessary description for my insurance application. Thank you, Sincerely, Antonio Polimeni.

Now, when you received that—It is marked Received—I believe you testified, April 24th?

A. Yes.

Q. Now, actually, Mrs. McConnell, what was the status of your office at the time of the receipt of that document?

A. We had just started remodeling the premises and partitions were being torn down. We had to move our desks around to get out of the way of painters or electricians or carpenters, whoever happened to be working, and it was quite chaotic.

Q. Was the application which I have just read mislaid in your office?

A. Yes, it was attached to another file by the girl on the fire insurance desk when she moved all her supplies from one desk to another to get away from the place where they were tearing down the partitions.

Q. Now, I will ask you when that letter subsequently came to light did you have sufficient information with which to write or bind insurance for Mr. Polimeni?

A. According to my training we did not have because I [197] don't write nor do I approve of any

(Testimony of Grace McConnell.)

insurance agent binding any borderline risk promiscuously without complete information.

Q. Did you have the capacity in your office at that time enabling you to have bound that risk without submitting it to a home office, so to speak?

A. No, and I have letters here where we had during the months of April, May and June—letters on other risks—exactly similar in nature where the companies would not take it. In fact, we have one that was cancelled.

Q. Now——

Mr. Nesbett: What was that last?

The Witness: One was cancelled.

Q. (By Mr. Renfrew): In that application, Mrs. McConnell, it states that a light plant is located fifty feet away from a building. Now, you have heard the testimony of Mr. Polimeni and also of Mr. Roof to the effect that the light plant actually was on the back porch, now is a gasoline operated light plant, is that a hazard?

A. It increases the hazard of the house as far as fire insurance.

Q. If you had been able to have written that insurance and the company would have subsequently discovered that the light plant was on the back porch instead of fifty feet away in a building, would they have ever paid the loss? [198]

Mr. Nesbett: I object to that question on the ground that the policy or agreement that would have gone——

(Testimony of Grace McConnell.)

The Court: Very well, the objection is sustained.

Q. (By Mr. Renfrew): I will call your attention to the next exhibit, Mrs. McDonnell, what is that No. 4, please, can you identify that?

A. It is Mr. Polimeni's inquiry as to the disposition of his application.

Q. I wish to read this to the jury, Your Honor. This is dated:

South Naknek, Alaska,
June 1, 1948

Ed. Coffey,
Anchorage, Alaska,

Dear Mr. Coffey:

"I have written you before concerning my insurance for my restaurant and I have received no reply.

"I would like to hear from you immediately and learn the particulars and premium of the policy. Are there any corrections to be made or what needs to be done? Please reply immediately. Thank you."

Sincerely,

ANTONIO POLIMENI.

This is stamped Received by Edward D. Coffey on June 4, 1948.

Q. After you received that letter in your office what [199] did you do, Mrs. McConnell?

A. We attempted to find Mr. Polimeni's letter and we searched as much as we could. It was not found until another girl who took the place—well,

(Testimony of Grace McConnell.)

there was a place on the fire insurance desk and the second girl found it attached to a file.

Q. Did you answer this inquiry of Mr. Polimeni's as to why he hadn't heard from you?

A. I personally didn't answer the letter but the girl on the fire insurance desk did and quoted our letter of April 9th.

Q. And that is Plaintiff's Exhibit No. 5, is it not? A. Yes.

Mr. Renfrew: I wish to read this to the jury. This is dated:

June 4, 1948

Mr. Antonio Polimeni,
South Naknek, Alaska.

“Re: Fire Insurance on Building occupied as Restaurant and Dwelling.

“We are in receipt of your letter of June 1st in regard to your insurance. We wrote you the following letter, mailed April 9, 1948, but evidently it was lost, so we will quote same:

“‘In reply to your letter of March 30th wish to advise that the fire insurance rate on both building and contents is \$3.00 per \$100 of insurance for one year.

“‘It is necessary to place a specific amount of insurance on the building and a specific amount on equipment and supplies. Beer and wine would be insured under stock. We enclose form which indicates how the insurance is divided.

“‘If insurance is ordered, we will need to have

(Testimony of Grace McConnell.)

a description of the location of the property. If the land is unsurveyed so you cannot give us lot and block numbers, please advise how far distant your building is from the Post Office or the Public School building. Also advise the construction and occupancy of any buildings within 100 feet of your building.'

"We trust that this is the information you desire."

Yours very truly,

EDWARD D. COFFEY,

By /s/

Q. Now, at the time that letter was written were you under the impression that there was only one building?

A. Yes, because at that time we didn't have the application indicating that there were three buildings with which to refer to.

Q. I call your attention to the next exhibit, which is exhibit No. 6 and ask you if you can state what that is?

A. Exhibit No. 6 is the original letter of July 23rd addressed by our office to Mr. Polimeni. [201] Mr. Renfrew: I wish to read this letter to the jury.

July 23, 1948

Mr. Antonio Polimeni
South Naknek, Alaska.

"Re: Fire insurance on building occupied as Restaurant and Dwelling."

(Testimony of Grace McConnell.)

Dear Mr. Polimeni:

“We wish to apologize for having mislaid your letter of April 17th giving us the details of the property you wish to have insured. We enclose herewith copy of your letter for reference as we need the following breakdown before we can issue policies:

“Building No. 1. Please designate a specific amount on the building and a specific amount on the equipment.

“Building No. 2. Specific amount on building.

“Building No. 3. Specific amount on building and specific amount on 8 k.w. light plant.

“We assume the stock of food supplies is contained within the restaurant and no other building.

“Will you kindly give us this information so we may issue your policies.”

Very truly yours,

EDWARD D. COFFEY,

By /s/ M. KASER.

Q. Now, I will ask you whether or not you ever received [202] any reply to your letter of June 4th in reply to Mr. Polimeni's letter of June 1st?

A. No, we didn't.

Q. And did you receive any further correspondence after your letter of July 23rd?

A. Only a letter from Mr. Marchbanks reporting the loss but not giving the date of the fire.

Mr. Renfrew: I wish to read Plaintiff's Ex-

(Testimony of Grace McConnell.)

hibit No. 7 to the jury written on the stationery of Hal M. Marchbanks, United States Commissioner, Kvichak Precinct, Naknek, Alaska.

August 2, 1948.

Mr. Edward D. Coffey
General Insurance
Anchorage, Alaska.

“Re: Fire Insurance on Building occupied as Restaurant and Dwelling.”

“Dear Mr. Coffey:

“I am writing this letter to advise you the building as above described, burned and the policy also burned so it is impossible to supply it with this letter.

“He wishes to put in a claim for the building.

“Kindly advise Mr. Antonio Polimeni of South Naknek, Alaska, of the procedure he is to take.”

Sincerely yours,

/s/ HAL M. MARCHBANKS,

HAL M. MARSHBANKS, by ib
United States Commissioner.

Q. Had you ever issued a policy or attempted to issue a policy, Mrs. McConnell?

A. No, we had not.

Q. In reply to that letter what did you do?

A. We wired Mr. Marchbanks.

Q. That is Plaintiff's Exhibit 8? Which I wish to read to the jury.

(Testimony of Grace McConnell.)

Anchorage, Alaska,
August 5, 1948.

Hal M. Marchbanks
United States Commissioner
Naknek, Alaska

Relet Antonio Polimeni no Insurance in Force as we Have Received no Reply to Our Letters of June Fourth and July Twenty-Third Requesting Value Breakdown on Building and Equipment Policies on Unprotected Restaurants Have to be Ordered From Seattle.

EDWARD D. COFFEY.

This is on a telegraphic form of the Signal Corps of the United States Army.

Q. Did you receive any further correspondence after that? A. No, we didn't.

Q. Did you send any further correspondence after that? A. We wrote to Mr. Polimeni.

Q. And that is Plaintiff's Exhibit No. 9 which I will read to the jury, dated August 5 addressed to Mr. Polimeni. [204]

“Re: Insurance Application.

“We have just received a letter from Mr. Marchbanks stating your new dwelling and restaurant burned. He did not indicate the date of loss. We are very sorry to have to advise you that not having received a reply to our letters of June 4th and July 23rd we could not order the insurance from the Insurance Company in Seattle. We do not have au-

(Testimony of Grace McConnell.)

thority to write unprotected restaurants in our own office, and have to place all applications with Seattle offices. Very few companies will write restaurant occupancies in locations having no fire protection, such as a Volunteer Fire Department. We would have had to place this risk through Lloyds, London, and we cannot submit an application until we have all the required information, which we did not have on your property.

“We are extremely sorry you were unable to reply to our letters so we could have ordered the insurance.”

Yours very truly,

EDWARD D. COFFEY,

By

Q. Now, Mrs. McConnell, on the information given you in the so-called letter of application of April the 17th which your office received but misplaced could you have written the insurance?

A. We could not have bound the insurance in our office without authority from our companies in Seattle. [205]

Q. Did you have sufficient information in that letter with which to submit to your companies in Seattle so that they could have said yes or no or did you need further information?

A. I never submit an application without complete details and particulars as to the risk involved. I don't believe in loosely applying coverage that might eventually become a matter of controversy.

(Testimony of Grace McConnell.)

Q. Whether or not you believe in that theory, Mrs. McConnell, is not of interest to this jury; what I want to know is whether or not you had sufficient information in that application of the 17th day of April to have submitted it to a company asking them to bind or did you have to have additional information in view of the fact that you then discovered there were three buildings?

Mr. Nesbett: Objected, Your Honor, a leading question.

The Court: I don't think it is leading so far. Continue.

Q. (By Mr. Renfrew): —or did you have to have additional information after you had been advised that there were three buildings, one of which housed a light plant?

A. We had to have a breakdown as to the values on each building and the equipment therein to submit the application.

Q. And you have testified that you did not, I believe, receive any reply to your letter of June 4th?

A. Right. [206]

Q. You have heard the testimony of Mr. Sheahan, who testified here that he was employed by the same firm up until sometime in the month of January, 1948, just previous to receiving this application, you heard that testimony?

A. Yes, I did.

Q. I will ask you whether or not you handle insurance from several companies through a general agent in Seattle?

(Testimony of Grace McConnell.)

A. Yes, we do, there are four general agencies in Seattle through whom we write insurance.

Q. Now, so that the jury and the Court will understand the technicalities of that procedure, Mrs. McConnell, would you state whether or not a general agent handles more than one company?

A. Yes, they do.

Q. Would it be possible then for your local agency here to submit an application to a general agent in which that general agent might write the policy in any one of a number of companies?

A. Yes, he might.

Q. Now, in connection with unprotected risks, I will ask you whether or not any general agencies which handled a number of companies for you gave you any specific written instructions in the spring of 1948?

A. Yes, we had one letter already brought into testimony from Cravens, Dargan & Company. [207]

Q. Do you have the letter before you?

A. No, I don't have the original, I have a copy. I can present the original.

Q. You had the original?

A. I am sorry, I guess I left it in the office.

Q. Here it is, I am sorry. I ask you if you can identify that? A. Yes.

Q. Is that a letter received from one of your general agents with regard to unprotected risks?

A. Yes, it is a letter from Cravens, Dargan & Company, dated January 23rd, 1948.

(Testimony of Grace McConnell.)

Mr. Renfrew: I offer this letter in evidence, Your Honor.

Mr. Nesbett: No objection.

The Court: It may be admitted as Defendant's Exhibit "A."

(The document referred to was marked Defendant's Exhibit "A," witness McConnell, and received in evidence.)

DEFENDANT'S EXHIBIT A

Cravens, Dargan & Company
Insurance Managers
60 Sansome Street
San Francisco, California

Aviation & Lloyds Department

W. Robert Anger
Northwest Supervisor
956 Stuart Building
Seattle 1, Washington

January 23, 1948

Edward D. Coffey Agency
Anchorage, Alaska

Gentlemen:

Re: Art Beaudin d/b/a 515 Club

This will confirm our telegram of January 23rd in which we advised that we could not offer any capacity on this risk. The fact that this risk is a cocktail bar and not a night club does not alter the fact that

(Testimony of Grace McConnell.)

the primary occupancy is that of retailing liquor. As you know this type of occupancy has always been considered borderline as far as fire insurance is concerned. At the present time we understand that due to a great drop in business the moral hazard is increasing rapidly. Therefore Mr. Cravens has made a strict ruling that we are to write no night clubs, clubs, bars, or unprotected restaurants.

We are very sorry that we cannot be of service to you in this instance but our underwriting rules cannot be relaxed.

Very truly yours,

CRAVENS, DARGAN &
COMPANY,

By /s/ JOHN F. SOLON.

JFS:meh

[Endorsed]: Filed August 22, 1950.

Mr. Renfrew: I wish to read this letter to the jury. This letter is on the stationery of Cravens, Dargan & Company, Insurance Managers, 60 Sansome Street, San Francisco, California, dated January 23, 1948. Received by Coffey's office January 26, 1948. It is addressed to Edward D. Coffey Agency, Anchorage, Alaska. Gentlemen: [208]

“Re: Art Beaudin d/b/a 515 Club.

“This will confirm our telegram of January 23rd in which we advised that we could not offer any

(Testimony of Grace McConnell.)

capacity on this risk. The fact that this risk is a cocktail bar and not a night club does not alter the fact that the primary occupancy is that of retailing liquor. As you know this type of occupancy has always been considered borderline as far as fire insurance is concerned. At the present time we understand that due to a great drop in business the moral hazard is increasing rapidly. Therefore Mr. Cravens has made a strict ruling that we are to write no night clubs, clubs, bars, or unprotected restaurants.

“We are very sorry that we cannot be of service to you in this instance but our underwriting rules cannot be relaxed.”

Very truly yours,

CRAVEN, DARGAN &
COMPANY,

By /s/ JOHN F. SOLON.

Q. The reference in that letter to “unprotected restaurants” Mrs. McConnell, would that be the class and the type of insurance requested by Mr. Polimeni? A. Yes, it is.

Q. Just so the jury understands clearly what an unprotected risk is, would you explain what an unprotected restaurant would be?

A. An unprotected restaurant is a building in a vicinity [209] which has no fire protection from a regular fire department or a volunteer fire department.

(Testimony of Grace McConnell.)

Q. Such as in a rural district or along a highway or in some hamlet or village?

A. That is right.

The Court: Would it make any difference whether it was a restaurant or any other type of place?

The Witness: Well, there are——

The Court: I mean, would any kind of building or business be an unprotected risk within the meaning of your answer where there was no fire protection?

The Witness: Right.

The Court: The fact that it was a restaurant——

The Witness: ——still doesn't make it protected.

Mr. Renfrew: I believe that is all, Your Honor.

Cross-Examination

By Mr. Nesbett:

Q. Mrs. McConnell, do you have Exhibit "A" that letter from Cravens before you?

A. I have a copy.

Q. I hand you Defendant's Exhibit "A," was that letter written in response to an inquiry from your office about insuring Mr. Beaudin's 515 Club?

A. Yes.

Q. And that inquiry was made by telegraph, was it? [210]

A. I don't know whether the inquiry was; their reply was a wire.

(Testimony of Grace McConnell.)

Q. Their reply? And do you have your file on that complete matter?

A. Not here I haven't.

Q. Do you have it at the office?

A. I think I can find it; this letter was only saved to put in our underwriting file for future reference.

Q. You save your correspondence, don't you?

A. Yes, I do.

Q. You could produce the file on that particular application and risk, couldn't you? A. Yes.

Q. Will you do that?

Mr. Renfrew: I ask the Court what the materiality of an application with reference to a local bar here in Anchorage, what possible materiality could that have in connection with this exhibit or in connection with this case?

The Court: Well, I suppose you had the letter introduced as an exhibit to show the restricted authority of the defendant, is that not correct?

Mr. Renfrew: Yes, and only for that purpose. It specifically states "unprotected restaurants."

The Court: Well, I suppose counsel wants to examine what induced the writing of this particular letter or what [211] representations were made to which this letter is a response. I assume that that is it, I don't know.

Mr. Nesbett: Yes, to inquire, Your Honor. I just want to know what background there was to this reply. I think it is pertinent. It is from one point of view, Your Honor; on the other hand from

(Testimony of Grace McConnell.)

another point of view it isn't. We are relying on the fact that they received the letter, could have done something about it and didn't. Whether they placed it with Cravens, Dargan is not especially important. They could have placed it with someone else. But as long as Mr. Renfrew is going to show that Cravens, Dargan didn't approve this also and we want to know why.

Mr. Renfrew: We would be glad to furnish it. We think, however, that the Court should have the opportunity to examine it before there is any incumbrance of the record. There is nothing in that correspondence excepting an application for a local bar. But the answer is obvious that the company said not only can't we take this risk but we are now absolutely refusing to take any protected restaurants, and that is in this reply.

The Court: The rule is, where you introduce a part of correspondence on the subject the adverse party has the right to have the rest of it and I suppose that what counsel wishes to have produced here is the letter for the purposes of examining what representations were made in it if any that induced the writing of this letter. He has the right to do [212] that although the Court thinks it is not very weighty in view of the fact that it is only one general insurance agency. If you insist on it why I think that it——

Mr. Renfrew: We will submit it.

Mr. Nesbett: Your Honor, I will ask a couple

(Testimony of Grace McConnell.)

of other questions and then maybe I will withdraw the question.

Q. Mrs. McConnell, then, as indicated in that letter, Cravens, Dargan sent a telegram to you with respect to Art Beaudin's 515 Club, didn't they?

A. Yes.

Q. And do you recall the general nature of the contents of that telegram?

A. No, I haven't had occasion to look at it.

Q. Was it in the file that—when you pulled that letter out?

A. No, it was entirely separate, letters which pertain to underwriting rules of an agency—general agency company—are kept currently and this is a letter which we saved to guide us in accepting or refusing requests in the future.

Q. You were in Mr. Coffey's office on January 28th when that letter was written, weren't you?

A. Yes.

Q. And do you recall whether Mr. Coffey was there at that time?

A. My recollection is that he went to Seattle just before [213] January 23rd.

Q. Then, would you, as office manager, be the one to note the contents of that letter and be guided accordingly? A. Yes.

Q. Mr. Sheahan had left the day before, hadn't he?

A. Well, he wasn't in the office. He wasn't off the payroll yet.

(Testimony of Grace McConnell.)

Q. He wasn't in the office in any event. Looking at that letter again, Mrs. McConnell, why do you suppose that Cravens, Dargan sent you a telegram prior to sending that letter?

A. We evidently didn't want the bar or they wouldn't have been in such a hurry to tell us about it.

Q. Isn't it quite possible that you telegraphed Cravens and Dargan so that you could get a risk covering Art Beaudin and his bar?

A. Not likely.

Q. It is possible that you received a telegraphic response? A. It is possible.

Q. Have you ever been in business for yourself, Mrs. McConnell? A. No.

Q. You have always worked for someone else?

A. Yes.

Q. Under the direction of an agent such as Mr. Coffey? A. That is right. [214]

Q. What do you mean by the technicalities of whether a risk is good or a risk is bad? You state that an underwriter has the duty of doing that sort of thing. A. That is right.

Q. Would you explain?

A. We have to follow certain instructions from the insurance companies as to the acceptability of risks and that applies to fire insurance and all the lines. One company will have one set of underwriting rules and another company will have others. Some companies are more lenient and some are more strict. It is up to the underwriter to abide

(Testimony of Grace McConnell.)

by the instructions of the insurance companies or the general agencies representing the companies.

Q. Would you say that your position under Mr. Coffey is that of underwriter, Mrs. McConnell?

A. The office manager accepts the duties of an underwriter.

Q. Then actually you are a sort of assistant underwriter; Mr. Coffey in this situation I guess would be analogous to that of the underwriter?

A. I didn't consider the owner of a business that of an underwriter; he is more of a salesman.

Q. Is that true of Mr. Coffey's position that it is analogous to that of underwriter?

A. No, mine.

Q. When you received Mr. Polimeni's letter of April 9th, [215] an inquiry with respect to rates, that is Plaintiff's Exhibit No. 1, you immediately answered it, didn't you? A. Yes.

Q. When was that letter received, do you know?

A. There is a received date on the original.

Q. April 6th, I believe.

The Court: Do you refer to the Plaintiff's Exhibit letter of April 9th, now, that is an obvious mistake?

Mr. Nesbett: I am referring to Plaintiff's Exhibit 1, Plaintiff's letter of March 30th.

Mr. Renfrew: I still suggest that they should be handed to her.

The Court: I think we will recess at this point. Court will be in recess until two p.m.

(Testimony of Grace McConnell.)

(Whereupon, at twelve noon the trial was recessed until two p.m. the same day.) [216]

Afternoon Session

Mr. Nesbett: Your Honor, before the witness resumes the stand I think Your Honor was going to consider as to whether or not we have a contract here. You would like to do it as early in the case as possible so as not to prejudice the defendant or prolong the trial and causing them to bring in additional testimony.

The Court: I didn't hear the first part of your statement?

Mr. Nesbett: Assuming Your Honor would reconsider your ruling on whether or not there was a contract in this case you would want to do it as early as possible in order not to prolong the trial or prejudice the defendants. This is what I learned at noon——

Mr. Renfrew: Just a moment. I have understood that there wasn't any question about reconsideration of that ruling and I object to any argument in the presence of the Jury on that point at all.

The Court: Well, I certainly didn't anticipate that it was an open question any more or would be considered an open question, however if you want to bring something to the attention of the Court that you think should be brought to the attention of the Court—is it something however that may properly be stated before the Jury?

(Testimony of Grace McConnell.)

Mr. Nesbett: I think I can state it in such a way, [217] Your Honor, that it certainly won't prejudice the case at all on the defendant's side of the case, but in discussing certain phases of the Egigik fire with Mr. Polimeni during the lunch hour I have uncovered testimony which I think will cause Your Honor to reconsider his ruling on the question of contract and I don't know whether Your Honor would want to have it come in now or when but I would like to put it before Your Honor.

The Court: If you want to state the substance of that evidence it ought to be done in the absence of the Jury. The jury may retire until recalled. Retire to the jury room until recalled.

(Reporter excused during arguments of counsel.)

Redirect Examination

By Mr. Renfrew:

Q. Mrs. McConnell, you have identified the various exhibits this morning, I refer now to Plaintiff's No. 2, which is the letter of April the 9th responding to the inquiry of March 30th made by Mr. Polimeni. In the second paragraph of that letter we say, "We enclose a form." I hand you this paper and ask you if that is the form that you enclosed to Mr. Polimeni when you sent the letter of April 9th?

A. This is the form. They are all the Form 78.

(Testimony of Grace McConnell.)

Q. It is a printed form, is it? A. Yes.

Q. And that is identical with the one sent him?

A. Yes, sir. [218]

Mr. Renfrew: We offer that in evidence, Your Honor.

Mr. Nesbett: There is no objection.

The Court: It may be admitted as Defendant's Exhibit "B."

(The document referred to was marked Defendant's Exhibit "B," witness McConnell, and received in evidence.)

BUILDING, EQUIPMENT AND STOCK FORM

Attached to and forming part of Policy No. _____ of the _____
NAME OF INSURANCE COMPANY

Agency at _____, City or Town and State _____, Dated _____
This policy covers the following described property, all situated _____

Designate Street Number or Lot and Block Number or Township, Section, Range and County _____ State of _____
12659
Item 1. \$ _____ ON the _____ story _____ roof _____ CONSTRUCTION _____ BUILDING
while occupied as _____ DESCRIBE OCCUPANCY _____
Item 2. \$ _____ ON EQUIPMENT, pertaining to Insured's occupancy as _____ DESCRIBE OCCUPANCY _____
all only while contained in, on or attached to the above described building. *sys* *B*
Item 3. \$ _____ ON STOCK, consisting principally of _____ DESCRIBE _____
all only while contained in, on or attached to the above described building. *Polimeri*
Item 4. \$ _____ ON _____ DESCRIBE _____ *vs. Plaintiff*
Item 5. \$ _____ ON _____ DESCRIBE _____ *coffee*

6. Insurance attaches hereunder only to those items for which an amount is shown in the space provided therefor and not exceeding said amount for such item(s). For definition of terms "Building," "Equipment," "Stock," see paragraph 7 below; for extensions and exclusions see paragraph Nos. 8 and 10 below.

7. DEFINITION OF TERMS:

(1) **BUILDING:** Building or structure in its entirety, including all fixtures and machinery used for the service of the building itself, provided fixtures and machinery are contained in or attached to and constitute a part of the building; additions in contact therewith; platforms, chutes, conveyors, bridges, trestles, canopies, gangways, and similar exterior structures attached thereto and located on the above described premises, provided, that if the same connect with any other building or structure owned by the named Insured, then this insurance shall cover only such portion of the same as is on the above described premises as lies between the building covered under this policy and a point midway between it and such other building or structure; also (a) awnings, signs, door and window shades and screens, storm doors and storm windows; (b) cleaning and fire fighting apparatus; (c) janitors' supplies, tools and implements; (d) materials and supplies intended for use in construction, alterations or repairs of the building. Provided, however, that property described in (a), (b), (c) and (d) immediately above must be, at the time of any loss, (1) the property of the named Insured who is the owner of the building; and (2) used for the maintenance or service of the building; and (3) contained in or attached to the building; (4) not specifically covered under an item other than the "Building" item of this or any other policy.

(1) **EQUIPMENT:** Equipment and personal property of every description, and, provided the described building is not owned by the named Insured, "Tenant's Improvements and Betterments" installed or paid for by the named Insured; but excluding, (1) bullion, manuscripts, and machine tools or foundry patterns, (2) property (whether covered under this policy or not) included within the description or definition of "Stock," (3) property for sale, and (4) property covered under the "Building" item of this or any other policy.

(1) **STOCK:** Stock of goods, wares and merchandise of every description, manufactured, unmanufactured, or in process of manufacture; materials and supplies which enter into the manufacture, packing, handling, shipping and sale of same; advertising material; all being the property of the named Insured, or sold but not removed (it being understood that the actual cash value of stock sold but not removed shall be the Insured's selling price); and the Insured's interest in materials, labor and charges furnished, performed on or incurred in connection with the property of others.

8. **EXTENSION CLAUSE:** Personal property of the kind and nature covered under any item hereof shall be covered under the respective item (a) while in, on, or under sidewalks, streets, platforms, alleyways or open spaces, provided such property is located within 50 feet of the described building; and (b) while in or on cars and vehicles within 300 feet of the described "Building," and (c) while in or on barges and scows or other vessels within 100 feet of the described premises; provided such property is not covered by marine, inland marine or transportation insurance of any kind.

9. **TRUST AND COMMISSION CLAUSE:** To the extent that the named Insured shall be liable by law for loss thereto or shall prior to loss have specifically assumed liability therefor, any item of this policy covering on personal property shall also cover property of the kind and nature described in such item, at the location(s) herein indicated, held in trust, or on consignment or commission, or on joint account with others, or left for repair or repairs.

10. **EXCLUSION CLAUSE:** In addition to property expressly excluded from coverage by any provision of this form or other endorsement attached to this policy, the following are not covered under any item of this policy and are to be excluded in the application of any "Average Clause": (a) Distribution Clause: land values, gardens, trees, lawns, plants, shrubbery, accounts, bills, currency, deeds, evidences of debt, money, securities, boats, motor vehicles,

In case of loss, the insured to furnish sub-stance and re-insurance, or the cost of same, Item San Francisco and/or Puget Sound ports and at the location of the loss and return, of one quarter, if one be sent, for all Companies concerned

11. Loss, if any, under each item of this policy shall be adjusted with and payable to the Insured specifically named herein unless otherwise agreed in writing by this Company.

12. Loss, if any, under item(s) _____ subject to all the terms and conditions of this policy, and to the written agreement, if any, between this Insured and the following named Payee, is payable to _____

Residence address is _____

13. **AVERAGE CLAUSE (THIS CLAUSE VOID UNLESS PERCENTAGE IS INSERTED):** In event of loss to property described by any item of this policy as to which item a percentage figure is inserted in this clause, this Company shall be liable for no greater proportion than the percentage of the actual value of the property described in such item bears to the following percentage of the actual value of the property described in such item at the time of loss, nor for more than the proportion which the amount of insurance specified in such item bears to the total insurance on the property described in such item at the time of loss:

_____ per cent (_____ %) applying to Item No. _____
_____ per cent (_____ %) applying to Item No. _____
_____ per cent (_____ %) applying to Item No. _____

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

THE PROVISIONS PRINTED ON THE BACK OF THIS FORM ARE HEREBY REFERRED TO AND MADE A PART HEREOF.

PROVISIONS REFERRED TO IN AND MADE PART OF THIS FORM (No. 78)

14. WAIVER OF INVENTORY AND APPRAISEMENT CLAUSE: If any item of this policy is subject to the conditions of the Average Clause (Paragraph 13 hereof), it is also provided that when an aggregate claim for any loss to the property described in any such item of this policy is not less than Five Thousand Dollars (\$5,000.00) and less than two per cent (2%) of the total amount of insurance upon the property described in any such item at the time such loss occurs, it shall not be necessary for the Insured to make a special inventory or appraisement of the undamaged property and nothing herein contained shall operate to waive the application of the Average Clause to any such loss.

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

15. EXCESS INSURANCE LIMITATION CLAUSE: No item of this policy shall attach to or become insurance upon any property, including the description of such item, which at the time of any loss

(a) Is more specifically described and covered under another item of this policy, or under any other policy carried by or in the name of the Insured named herein, or

(b) Being the property of others is covered by insurance carried by or in the name of others than the Insured named herein, and the liability of insurance described under (a) or (b) has first been exhausted, and shall then cover only the excess of value of such property over and above the amount payable under such other insurance, whether collectible or not. This clause shall not be applicable to property of others for the loss of which the Insured named herein is liable by law or has prior to any loss specifically assumed liability.

16. TENANT'S IMPROVEMENTS AND BETTERMENTS CLAUSE: "Tenant's Improvements and Betterments" (subject to the provisions of the paragraph hereof entitled "Equipment") are covered as property of the named Insured under the "Equipment" item of this policy, regardless of whether or not the same have or will become a permanent or integral part of the building (a) or the property of the building owner or lessor. The amount of loss on such "Tenant's Improvements and Betterments" shall be determined on the basis of the actual cash value thereof at the time of loss. In the event of any limitation upon the interest of the Insured therein resulting from any lease or rental agreement affecting the same, the Insurance or the "Tenant's Improvements and Betterments" shall not be prejudiced, nor shall the amount recoverable for loss thereon be diminished, because of such limitation covering on the same issued in the name of the owner of said building (a) or of others than the Insured named in this policy. This policy, however, shall not contribute to the payment of any loss to "Tenant's Improvements and Betterments" covered under any policy or policies issued in the name of the owner of said building (a) or of others than the Insured named in this policy.

17. CONSEQUENTIAL DAMAGE ASSUMPTION CLAUSE: (To apply only if stock of merchandise, provisions or supplies in cold storage, which stock is subject to damage through change of temperature, are covered hereunder.) This Company (subject to the terms of this policy) shall be liable for consequential loss to stock of merchandise, provisions and supplies in cold storage covered hereunder caused by change of temperature resulting from total or partial destruction by any peril insured against in this policy, of refrigerating or cooling apparatus, condensing or supply pipes thereof, unless such loss is specifically excluded as to any such peril by express provision of any form, rider or endorsement attached to this policy.

The total liability for loss caused by any peril insured against in this policy and by such consequential loss, either separately or together, shall in no case exceed the total amount of this policy in effect at the time of loss. If there is other insurance upon the property damaged covering the perils, or any of them, which are insured against in this policy, this Company shall be liable only for such proportion of any consequential loss as the amount hereby insured bears to the whole amount of insurance thereon whether such other insurance covers against consequential loss or not.

18. BREACH OF WARRANTY CLAUSE: If a breach of any warranty or condition contained in any rider attached to or made a part of this policy shall occur, which breach by the terms of such warranty or condition shall operate to suspend or avoid this insurance, it is agreed that such suspension or avoidance due to such breach, shall be effective only during the continuance of such breach and then only as to the building, fire division, contents therein, or other separate location to which such warranty or condition has reference and in respect of which such breach occurs.

19. SUBROGATION WAIVER CLAUSE: This insurance shall not be prejudiced by agreement made by the named Insured releasing or waiving this Company's right of subrogation against third parties responsible for the loss, under the following circumstances only:

(1) If made before loss has occurred, such agreement may run in favor of any third party;

(2) If made after loss has occurred, such agreement may run only in favor of a third party falling within one of the following categories at the time of loss:

(a) A third party insured under this policy; or

(b) A corporation, firm, or entity (1) owned or controlled by the named Insured or in which the named Insured owns capital stock or other proprietary interest, or (2) owning or controlling the named Insured or owning or controlling capital stock or other proprietary interest in the named Insured;

(3) Whether made before or after loss has occurred, such agreement must include a release or waiver of the entire right of recovery of the named Insured against such third party.

20. AUTOMATIC REINSTATEMENT CLAUSES: (a) Applying to losses not exceeding One Hundred Dollars (\$100.00) under this policy, the amount of insurance hereunder involved in a loss payment of not more than One Hundred Dollars (\$100.00) for this policy shall be automatically reinstated.

(b) Applying to losses in excess of One Hundred Dollars (\$100.00) under this policy: In the event of any loss payment under this policy in excess of One Hundred Dollars (\$100.00) the amount paid shall be deemed reinstated and this policy automatically reinstated to the full amount in force immediately preceding said loss, provided that the policy shall be endorsed to that effect within 30 days after the payment of loss, and the Insured shall pay to the Company the pro rata premium for the unexpired term from the date of said loss to the expiration of this policy, at the rate in force at the time said reinstatement. This clause shall apply to each loss separately.

21. VACANCY—UNOCCUPANCY—CESSATION OF OPERATIONS CLAUSE: Unless otherwise specified by endorsement added hereto: (a) If the subject of this insurance be a manufacturing, mill, or mining plant, permission is granted to remain vacant or unoccupied or to shut down and cease operations, for a period of not to exceed sixty (60) consecutive days at any one time; or (b) If the subject of insurance be a cannery, fruit, nut or vegetable packing or processing plant, fish reduction plant, hop kiln, rice drier, beet sugar factory, cotton gin, cotton compress or cotton seed oil mill, permission is granted to remain vacant or unoccupied for a period of not to exceed sixty (60) consecutive days at any one time, or to shut down and cease operations (but not to be vacant) for a period of not to exceed ten (10) months at any one time; (c) Except as otherwise provided in (a) and (b) immediately above, permission is granted to remain vacant or unoccupied without limit of time. Nothing herein contained shall be construed to abrogate or modify any provision or warranty of this policy requiring (1) the maintenance of watchman service; (2) the maintenance of all fire extinguishing appliances and apparatus including sprinkler system, and water supply therefor, and fire detecting systems, in complete working order; nor shall it extend the term of this policy.

22. PERMITS AND AGREEMENTS CLAUSE: Permission granted: (a) For such use of the premises as is usual or incidental to the business conducted therein and for existing and increased hazards and for change in use or occupancy except as to any specific hazard, use, or occupancy prohibited by the express terms of this policy or by any endorsement thereto; (b) To keep and use all articles and materials usual and incidental to the business, in such quantities as the exigencies of the business require; (c) For the building (a) to be in course of construction, alteration or repair, without limit of time but without extending the term of this policy, and to build additions thereto, and this policy under its respective item (a) shall cover (b) and (c) in such additions in contact with such building (a); but if any building herein described is protected by automatic sprinklers, this permit shall not be held to include the reconstruction or the enlargement of any building so protected, without the consent of this Company in writing. This permit does not waive or modify any of the terms or conditions of the Automatic Sprinkler Clause (if any) attached to this policy.

This insurance shall not be prejudiced: (1) By any act or neglect of the owner of the building if the Insured is not the owner thereof, or by any act or neglect of any occupant of the building (other than the named Insured), when such act or neglect of the owner or occupant is not within the control of the named Insured; (2) By failure of the named Insured to comply with any warranty or condition contained in any form, rider or endorsement attached to this policy with regard to any portion of the premises over which the named Insured has no control; nor (3) shall any insurance hereunder on building (a) be prejudiced by any error in stating the name, number, street or location of such building (a).

23. ELECTRICAL APPARATUS CLAUSE: If electrical appliances or devices (including wiring) are covered under this policy, this Company shall not be liable for any electrical injury or disturbance to the said electrical appliances or devices (including wiring) caused by electrical currents artificially generated unless fire ensues, and if fire does ensue this Company shall be liable only for its proportion of loss caused by such ensuing

(Testimony of Grace McConnell.)

Q. (By Mr. Renfrew): I ask you whether or not that form was ever returned executed?

A. No, sir.

Q. Was it ever returned at all?

A. No, sir.

Q. In the letter of April 9th, being Plaintiff's Exhibit 2, you stated, "It is necessary to place a specific amount of insurance on the building and a specific amount on equipment and supplies; beer and wine would be insured under stock. We enclose form which indicates how the insurance is divided." Now, in that form does that set forth the place to set out the separate buildings?

A. No, this is for one building and the equipment and the stock in one building.

Q. Now, I will ask you, of course, when you sent that you had only the inquiry letter of March 30th?

A. Yes, sir. [219]

Q. Now, is there any exclusions pointed out or are there any exclusions pointed out on that form which you forwarded?

A. Yes, sir, there are standard exclusions in all of our policies.

Q. And where are they located on the form?

A. It would be paragraph 10, Exclusion Clause.

Mr. Renfrew: Will counsel stipulate to the waiving of the reading of this entire exhibit at this time?

Mr. Nesbett: Yes, I will.

Mr. Renfrew: I wish to read, Your Honor, just the exclusion clause under paragraph 10:

(Testimony of Grace McConnell.)

“In addition to property expressly excluded from coverage by any provision of this form or other endorsement attached to this policy, the following are not covered under any item under this policy and are to be excluded in the application of any average clause or distribution clause * * *” And among other things listed such as land values, gardens, trees, lawns, plants, shrubbery, accounts, bills, is the word “currency and money.” Now, I will ask you, Mrs. McConnell, would it have been possible for you to insure the currency which Mr. Polimeni has alleged that he lost that was buried in his basement?

A. Not under a fire insurance policy.

Q. Not under a fire insurance policy?

A. No, sir. [220]

Q. Now, you testified this morning that on the 23rd of January, a letter bearing that date at least, from Cravens, Dargan & Company advised you that you could no longer write unprotected restaurants?

A. Yes, sir.

Q. How many companies do Cravens, Dargan represent that you write through?

A. Two, one American company and Lloyds.

Q. You heard Joe Sheahan testify that he would have bound this risk for some \$1500 or \$2500, whichever he could have and then would have submitted the balance to Lloyds, you heard him testify to that?

A. Yes, sir.

Q. Is the Lloyds Company that Cravens and

(Testimony of Grace McConnell.)

Dargan represent the same Lloyds and the only Lloyds that there is insofar as the testimony of Mr. Sheahan is concerned, is that just one company?

A. That is one Lloyds connection; there is another Lloyds connection through Sweet & Crawford.

Q. Did you have outlets through both Sweet & Crawford and Cravens, Dargan?

A. Yes, we did.

Q. Now, Sweet & Crawford at any time ever limit your risk on unprotected restaurants?

A. We had an application from Nanana for a restaurant. [221] Now, I don't know if Nanana has a volunteer fire department.

Mr. Nesbett: I object to this answer as not being responsive—"Did they ever limit * * *?" It would have to be, Your Honor, a general limitation on their ability to either bind or get permission to cover unprotected risk, I think that should be the tone of the answer rather than state some particular instance in Nanana.

The Court: I have ruled time and again that the answer that is not responsive is not available to anyone except the counsel doing the questioning and if you have to object you have to object on some other grounds otherwise the Court can't pay any attention to it, on such grounds as incompetent.

Mr. Nesbett: I will object, incompetent, irrelevant and not material, not responsive to the question put.

The Court: Overruled.

(Testimony of Grace McConnell.)

Mr. Renfrew: You may answer.

A. In Nanana a man owned a restaurant and they asked us to insure this restaurant and with the application we wrote to Sweet & Crawford and asked them if they could take the risk and they replied they could not in Lloyds and that——

Q. When was that?

A. Their letter is dated June 9th.

Q. June 9th? A. 1948. [222]

Q. 1948, that would be then two other companies or would that be one of them? A. Two.

Q. Two other companies?

A. Lloyds and Sun.

Q. You have another outlet through another agent, Frank Burns, I believe, is that correct?

A. Yes, sir.

Q. Have you had any experience with Frank Burns in the spring of 1948 limiting you or excluding unprotected risks completely?

A. Yes, sir, this risk in Nanana had been insured in three years in Rhode Island, which was one of Frank Burns' companies.

Q. Was this risk in Nanana a restaurant?

A. Yes, sir.

Q. All right, go ahead.

A. And we wrote to Frank Burns and asked if they could renew this risk.

Q. When did it expire?

A. In February, 1948.

Q. Yes.

A. The owner of the restaurant did not write

(Testimony of Grace McConnell.)

for the renewal until May 1st. On May 21st Frank Burns responded "We are sorry to advise that we will be unable to handle this [223] in our companies. Our loss experience has been poor on restaurants and as this is unprotected would be that much worse. If you wish we will be happy to attempt to broker it for you. It is very doubtful that we could place this in American companies and it is likely it would have to be placed with Lloyds." Frank Burns has five companies.

Q. Handles five companies? A. Yes.

Q. And you had already, I believe, according to your testimony, had advices from both of your Lloyds outlets that they wouldn't write unprotected restaurants? A. Yes, sir.

Q. Now, then, as a total how many companies were you advised of in the spring of 1948 that you could not write these unprotected risks on, how many different companies?

A. On the basis of this testimony, seven American companies and two Lloyds outlets. There were other American companies, too.

Q. What do you mean by "There were other American companies"? You mean there were other American companies which you have received advices from that you haven't testified concerning?

A. Yes, sir, Golden Rule.

Q. What is the circumstances surrounding that outlet for your coverage on unprotected risks?

The Court: What is the name of that one?

(Testimony of Grace McConnell.)

The Witness: Golden Rule, General Agents. It is the Nanana risk.

Q. (By Mr. Renfrew): Do I understand from your testimony that you attempted then to place the Nanana risk with Gould & Gould?

A. Yes, sir.

Q. And what was their reply?

A. "Your favor of the 25th on the above. We can undoubtedly place this business with Lloyds. I know the risk and I know the assurance. Advise us of the details and also tell us if it is to be written for one year or three. If three years it is two and one-half times the annual premium as Nanana is not given a credit for protection by the Pacific Board."

Q. Was the risk subsequently written through Gould?

A. Yes, sir, in July, not one of the companies we represented but in a company they brokered with.

Q. No company that you had any outlet with at all, is that your testimony? A. Yes, sir.

Q. And how long had you been trying to place that, did you say since February? A. May.

Q. Since May? A. Yes, sir. [225]

Q. And it was finally——

A. ——consumated in, I believe it was, July 22nd.

Q. And do you have a copy of the policy?

A. Yes, sir.

Q. What is the date—the date limits on the policy? A. It was effective July 22, 1948.

(Testimony of Grace McConnell.)

Q. July 22, 1948? A. Yes, sir.

Q. Then the date of the coverage dated from the time you were able to effect it rather than from the date of application of the person to get the coverage?

A. We received the policy on August 4th.

Q. I think you misunderstood me, you stated that that coverage had previously been written by some company that you handled?

A. Rhode Island.

Q. And am I correct in stating that that was a company that you had handled?

A. We represented. It was too old a risk for me to determine if we had had it in our office.

Q. When had the policy expired?

A. In February, 1948.

Q. And had you attempted to renew it?

A. We did not have a request to renew it until May.

Q. Did you attempt to renew it? [225A]

A. Yes.

Q. In May? A. Yes, sir.

Q. And you were unable to do so?

A. Frank Burns said they couldn't handle it.

Q. Now, do I understand your testimony to be that you finally got an outside broker to place it in a company which you had nothing to do with?

A. Well, if you would call Gould & Gould a broker. They are general agents. They brokered it to a company they did not represent. They had to go out on the street, so to speak, to get it covered.

(Testimony of Grace McConnell.)

Q. Now, what I want to know, is the policy dated back in May first when the man up at Nenana said " I want you to get some insurance" or was it dated when Gould & Gould were able to find somebody who would insure it?

A. It was dated when Gould & Gould could find somebody to insure it.

Q. Were you able to get the information Mr. Nesbett requested before lunch, that is, the file on the Beaudin application? A. Yes, sir.

Q. Do you have that there now?

A. Yes, sir.

Mr. Renfrew: That is all, Your Honor. [226]

Recross-Examination

By Mr. Nesbett:

Q. What was wrong with that Nenana restaurant that they all shied away from it?

A. It was the nature.

Q. What was the nature of it?

A. Unprotected restaurants are considered undesirable business.

Q. What was peculiar about this Nenana restaurant?—

A. It was no more peculiar—

Q. —that caused everyone to shy away from it?

A. Because they weren't writing unprotected restaurants.

Q. You mean it didn't make any difference

(Testimony of Grace McConnell.)

whether it was the Nenana or any unprotected restaurant? A. That is right.

Q. They were all shying away from it?

A. That is right.

Q. They finally got a policy on July 22nd?

A. Yes, sir.

Q. You knew about all the trouble with the Nenana restaurant, you were at the office all the time? A. Yes, sir.

Q. What caused you to write Mr. Polimeni and ask him to send this information?

A. Because we could find a—— [227]

Q. You used the word “issue”?

A. The word issue may be used loosely, as to whether you actually write the policy——

Q. What caused you on August 4th to cause you to write to Polimeni and say “We are so sorry about all this. We have to go to Seattle to write unprotected restaurants.”

A. All this correspondence is from Seattle.

Q. “Our Seattle office” you said, didn’t you, in your letter of August 4th—5th?

Mr. Renfrew: Show her the letter.

The Court: Look at Exhibit No. 9, do you have it there?

The Witness: No.

The Court: You are familiar with the letter?

The Witness: Yes.

Q. (By Mr. Nesbett): “We have to place all applications with Seattle offices——”

A. Right.

(Testimony of Grace McConnell.)

Q. “——and issue policies on July 23rd.”

A. Yes, sir, using the word “issue” can be used very loosely as to whether you write the policy or whether you order the policy.

Q. As a matter of fact, on July 23rd when you discovered Tony’s letter there in the office you could have wired your Seattle office describing the risk and asked for coverage, [228] couldn’t you?

A. Yes. But we still did not have the breakdown.

Q. You could have wired though and given them the information and asked for insurance?

A. We don’t submit until we have the full particulars. You must remember on the Nenana risk we had the full particulars. We already had an existing policy.

Q. To answer my question, you could have wired on July 23rd when you discovered Tony’s letter, couldn’t you? A. No, sir.

Mr. Renfrew: I object to that question as it is susceptible of only one answer and that would be that she obviously could have wired because she has the physical capabilities of doing it and in order to answer that question under oath, Your Honor, she has to say “yes,” but you can’t answer that question and say “yes” without a qualification. Counsel should state what he means by “could she”?

The Court: I assumed that what counsel had in mind is what his previous questions implied, although the witness may not necessarily understand it that way, and for that reason I think the question should be a little more definite.

(Testimony of Grace McConnell.)

Q. (By Mr. Nesbett): Mrs. McConnell, you said, did you, that it was not your policy to submit until you had all the details?

A. Yes, sir. [229]

Q. Is that a policy laid down by Mr. Coffey?

A. I don't know that he has said that in so many words; it was my training.

Q. Is that your policy, then?

A. Yes, sir.

Q. As a matter of fact, though you could have wired on July 23rd giving the details of the risk and stating that although there were three buildings the definite allocation of \$6,000 between them would have to be determined later and gotten the ball rolling, couldn't you?

A. That is a matter of judgment.

Q. You could have done that?

Mr. Renfrew: You mean physically again? I still make the same objection.

The Court: I think it is clear enough now, because the other question that immediately preceded it, as to what counsel means and I think the witness understands what he means and the objection is overruled.

Q. (By Mr. Nesbett): You could have sent such a wire, couldn't you, when you received Tony's letter?

A. I could have sent a wire; that doesn't mean coverage.

Q. No, you could have asked for coverage saying the details on the allocation of \$6,000 between three

(Testimony of Grace McConnell.)

buildings will be furnished later, and asked for confirmation? [230]

A. We don't wire for coverage until we know how it is going to apply.

Q. That is your policy? A. Yes, sir.

Q. Now, this form, your personal policy, pardon me—— A. Yes, sir.

Q. ——this form, Mrs. McConnell, which was introduced in evidence and is attached in the pleadings to Plaintiff's Exhibit 2, is it your testimony that you sent a copy of that form along with your letter of April 9th? A. Yes, sir.

Q. Which is Plaintiff's Exhibit 2. You are sure that went out? A. Yes, sir.

Q. Do you say that because the letter says that it is enclosed? A. Are my initials on that letter?

Q. The letter of April 9th, yes, your signature is on it apparently.

A. Yes, sir, to my knowledge.

Q. This is a copy of that letter of April 9th, Plaintiff's Exhibit 2, apparently you wrote it for Mr. Coffey? A. Yes.

Q. And at the end of paragraph 2 you say "We are enclosing a form." [231] A. Yes, sir.

Q. That is the form just introduced in evidence?

A. Yes, sir.

Q. Do you say that form is enclosed in the letter because the letter says it is enclosed or do you recall the incident?

A. I couldn't swear, that is too much to expect of one's memory.

(Testimony of Grace McConnell.)

Q. Ordinarily you would have included the form, wouldn't you? A. Yes.

Q. I believe your testimony was you didn't receive that form back from Mr. Polimeni?

A. No, sir.

Q. How do you know you didn't receive it back?

A. Because we have his other two letters and it wasn't enclosed.

Q. Are you sure that form isn't knocking around in the office attached to some stray file?

A. No, sir.

Q. How can you be certain of that?

A. I remember the letter coming in and there was no form attached to it.

Q. You remember this letter of February 17th with the form in it? A. Yes, sir. [232]

Q. Did you open the mail?

A. Yes, I open all the mail.

Q. And you read Mr. Polimeni's letter?

A. Yes, sir.

Q. What did you do to it?

A. I gave it to the fire insurance girl.

Q. And what would her duties ordinarily have been, ordinarily?

A. She should have written a letter to Mr. Polimeni asking for a further breakdown.

Q. Don't you pass that sort of thing along to the boss, Mr. Coffey, and get his opinion on it?

A. No, not necessarily.

Q. Well, do you handle those matters yourself without referring them?

(Testimony of Grace McConnell.)

A. Ninety per cent of the business I handle myself.

Q. Did Mr. Coffey never see it?

A. It would be physically impossible for him to handle all the details.

Q. So many of these things?

A. Not on unprotected restaurants, no.

Q. Did you take this unprotected restaurant application to Mr. Coffey? A. No, sir.

Q. Rather you gave it to the insurance girl, did you? [232A] A. Yes, sir.

Q. Do you know what happened after she received it? A. That is when the letter was lost.

Q. Did she lose it?

A. No, I would say the carpenters.

Q. You say the carpenters lost it?

A. When they were taking down the partitions we had to move the files around and one morning when we came back to work things were in quite a mess. They had a lot of trouble trying to get them back together again and we didn't find that letter until July 23rd.

Q. That is 62 days after the date it was written?

A. There are an awful lot of papers in an insurance office.

Q. Is it your testimony, Mrs. McConnell, that an application for insurance protection on an unprotected restaurant being so difficult to acquire that you don't refer an important matter like that to Mr. Coffey himself?

(Testimony of Grace McConnell.)

A. No, I am perfectly capable of handling it myself.

Q. Under your own policies? A. Yes, sir.

Q. All right. When you received Mr. Polimeni's letter of April 9th, that is Plaintiff's Exhibit 2—

A. Mr. Polimeni's letter?

Q. Pardon me, Mr. Polimeni's letter of March 30th, Plaintiff's Exhibit 1, did you know when you read that letter [233] where the light plant was located, Mrs. McConnell?

A. No, he doesn't make the distinction whether it is away or in the building.

Q. I see. And what did you assume when you wrote your reply to that letter—the letter of April 9th with respect to the location of the light plant?

A. I would assume it was away from the building.

Q. And did you so assume when you quoted a rate of \$3 per one-hundred per year?

A. Yes, sir.

Q. And what would the rate have been if the light plant had been sitting on an open back porch?

A. I don't know. I know that the rate for a light plant by itself is \$1.70 a hundred.

Q. What would the rate on the building have been, that is, would it have been more than \$3 per hundred, of course?

A. That I don't know without checking in the rate book.

Q. Do you know that it would be greater?

A. I don't know that.

(Testimony of Grace McConnell.)

Q. You don't know whether it would be greater if the building——

Mr. Renfrew: If what?

Q. (By Mr. Nesbett): ——if the light plant were located on the back porch rather than away from the building? [234]

A. I don't know and without looking at a rate book——.

Q. I believe you testified this morning, did you not, Mrs. McConnell, that you initiated a file on Mr. Polimeni when you received this letter of March 30th?

A. That is right, I answered his inquiry.

Q. Didn't you already have a file on him concerning these other matters—the airplane and the Egigik property?

A. I had not been with Mr. Coffey's when Mr. Polimeni's dwelling was insured and I wasn't aware of it.

Q. You were with Mr. Coffey during the time that Mr. Polimeni was trying to collect on the Egigik kitchen fire, weren't you?

A. I didn't handle that at all. I heard about it from the girl who had been there before me and my recollection is that the insurance adjuster in Seattle couldn't pay or rather couldn't secure a check from the insurance company because he was unable to secure a signed proof of loss from Mr. Polimeni although he had written to him several times for it.

Q. Did you talk to Mr. Polimeni when he came into Anchorage about this loss?

(Testimony of Grace McConnell.)

A. No, I have never seen Mr. Polimeni before this trial.

Q. Did the other girl talk with him when he came in? A. I don't know.

Q. Well, Bill Sheahan had something to do with that handling of that loss? [235]

A. I thought Millie Moriarty.

Q. Now, when the insurance girl received this letter of April 23rd her duty—April 17th—pardon me—would have been to draft a reply to Mr. Polimeni, is that correct?

A. Well, it was her purpose to match it up with the existing file.

Q. But assuming that she had done that, then she would have written a letter from Mr. Polimeni asking for a breakdown? A. Yes, sir.

Q. Would any of this correspondence have gone over Mr. Coffey's desk? A. No, sir.

Q. He wouldn't have known what was going on at all? A. No, sir.

Q. How do you file your insurance problems or matters such as the Polimeni matter, Mrs. McConnell, what is the procedure?

A. We have a application for fire. The office work is departmentalized and the girl on the fire insurance desk has her own application suspense file.

Q. And that is the file that apparently got mislaid for sixty days? A. Yes, sir.

Q. Who did that contracting work, Mrs. McConnell? [236]

(Testimony of Grace McConnell.)

Mr. Renfrew: I am unable to hear you, Miss. Will you speak a little louder.

Q. (By Mr. Nesbett): Who did that work, Mrs. McConnell? I hate to shout at the woman.

A. You mean what is the name of the girl on the fire insurance?

Q. What is the name of the contractor who remodeled your offices?

A. I believe it was done in day labor. Murray Liblock did part of that.

Mr. Renfrew: How do you spell it?

The Witness: I don't know how to spell it. I remember offhand Murray Liblock. Well, the owner of the building would know.

Mr. Renfrew: Frank Lindelof?

The Witness: I don't really know.

Q. (By Mr. Nesbett): And the first name sounds like Murray to you?

A. Yes, but I didn't know their names.

Q. Do you recall how long they were engaged in that alteration?

A. Well, it was done quite piecemeal. First the partitions were down and then electricians came in and then linoleum was laid and painters came in and new desks came in and new [237] files. It was at least two months.

Q. Two months?

A. Before we were settled.

Q. Do you recall the date you worked—the approximate date the work was commenced, Mrs. McConnell?

(Testimony of Grace McConnell.)

A. I believe it was the latter part of April or the first part of May, we were doing quite a bit of work figuring out how to remodel to get more space.

Q. Of 1948? A. Yes, sir.

Q. Do you recall what instructions, if any, you gave the insurance girl when she got her letter of—when she got Tony's letter of—

A. —April 17th. I instructed her to write to Mr. Polimeni again to get a breakdown on the values of each building and the value of the equipment in each building.

Q. And then did you just turn the letter over to her? A. Yes, sir.

Q. And did you turn Mr. Polimeni's file over to her at the same time?

A. She had the original file; it was in her application-suspense.

Q. And do you know she had the original file?

A. Yes, sir.

Q. And do you as office manager have any means of checking [238] to see whether the girls reply to letters similar to that of April 17th?

A. I don't check everything unless they are brand-new employees. This girl had been on the desk since December—first part of December.

Q. Of 1947? A. Yes, sir.

Q. Well, don't you have a check also of some kind so that you will know the girl has done as you instructed her to do? A. No, sir.

Q. Who would have signed the letter that she wrote? A. She would have.

(Testimony of Grace McConnell.)

Q. And would have mailed it?

A. Yes, sir. Well, we have one girl put up all the mail. Each girl does not put up her own mail.

Q. Well, she would have written the letter, signed it and turned it over to the mail girl?

A. Yes, sir.

Q. And then you didn't know whether or not she had answered that letter of April 17th at all until you received Mr. Polimeni's letter of June 1st, did you? A. No.

Q. And what did you do then, did you open that letter, Miss McConnell? A. Yes, sir.

Q. What did you do when you saw that letter of June 4th [239]

Mr. Renfrew: Which exhibit is that?

Mr. Nesbett: That is Plaintiff's Exhibit 4.

The Witness: I asked the girl.

Mr. Renfrew: Just a moment, now, Plaintiff's Exhibit 4?

Mr. Nesbett: The letter of June 1st, Plaintiff's Exhibit 4.

Mr. Renfrew: That is the letter of Mr. Polimeni's. The answer to that—that is the letter of June 1st instead of June 4th.

Mr. Nesbett: Can't you follow the tone of the questioning? I said the letter of June 1st, 1948, Plaintiff's Exhibit 4.

Mr. Renfrew: I misunderstood you. I thought you said June 4th, excuse me.

Q. (By Mr. Nesbett): Exhibit 4, June 1st. Now you saw the letter, did you not, Mrs. McConnell?

(Testimony of Grace McConnell.)

A. Yes, sir.

Q. And did you read it? A. Yes, sir.

Q. And what did you do after you read it?

A. I asked her to give me her file on it.

Q. The fire insurance girl?

A. On the fire insurance desk. [240]

Q. Then what happened?

A. She brought me the file which was the original inquiry and our reply quoting the rate and I told her that there was another letter which came in giving us details concerning it and she said "I can't find it."

Q. And then what did you do as office manager?

A. We all tried to find it.

Q. And what did you do in your attempt?

A. Well, we went through all the correspondence files which this girl had on her desk.

Q. The insurance girl?

A. The fire insurance girl.

Q. And what else?

A. When we couldn't find it I told her to write to Mr. Polimeni and get the information again.

Q. How long did you look for it, do you recall?

A. No, not more than a day.

Q. Then I presume Plaintiff's Exhibit 5, the letter of June 4th to Mr. Polimeni written by, apparently, Edmond McCord? A. Yes.

Q. She was the fire insurance girl?

A. Yes.

Q. Is the reply you directed her to write?

A. Yes, sir.

(Testimony of Grace McConnell.)

Q. After looking for Mr. Polimeni's letter one day? [241] A. Yes, sir.

Q. Did you make any other attempt to locate it after that one day search? A. No, I didn't.

Q. Did you keep the Polimeni file on your desk after that unsuccessful search in order to remind you to look again?

A. No, it was kept on this other girl's desk.

Q. You just forgot about the thing assuming that Polimeni would sooner or later send you the information—rather send you the other again?

A. Yes, sir.

Q. Well, can you tell me why when you told Mrs. McCord to write the letter of June 4th you didn't also tell her to have Tony designate how he wanted that insurance divided between the three buildings?

A. I probably didn't remember that he had three buildings.

Q. Oh, you forgot and in his letter of April 18th he had listed three buildings? A. Yes, sir.

Q. Can you state whether or not Mr. Coffey was in the office between March 30th and, oh, July 23rd?

A. He took one trip to Seattle during that time but I don't recall the exact period?

Q. Was it during this reconstruction period when the rebuilding period of the office, Mrs. McConnell, or do you [242] know? A. I believe it was.

Q. And do you recall how long that trip lasted?

A. No, I don't.

Q. Do you recall approximately how long it lasted?

(Testimony of Grace McConnell.)

A. Well, he usually was gone about ten days.

Q. Usually, you mean each time he goes down?

A. Yes.

Q. Would you say that it was about ten days this time?

A. That is my recollection.

Q. During the rebuilding of the office?

A. Yes, sir.

Q. In any event though, Mrs. McConnell, isn't it your testimony that even though he had been in the office during all the period of this correspondence ordinarily he wouldn't have been bothered with such matters as passing on Tony's application?

A. No, sir.

Q. He would not have been?

A. He would—no.

Q. Did it ever occur to you when you received Tony's letter of June 1st, Plaintiff's Exhibit 4, to go ahead and send some *some* type wire to Seattle to try and protect his restaurant building or get the thing rolling—the ball rolling on it? [243]

A. I told you I didn't submit risks without full details and particulars.

Q. Well, in all your twenty years' experience as an underwriter and under supervision and in offices, wouldn't it have been good practice to go to Mr. Coffey when you received that letter of June 1st and said "Look, Mr. Coffey, I am sure Tony sent us a lot of information, it has been lost and here it is June 1st, he is inquiring about it, isn't there some-

(Testimony of Grace McConnell.)

way we can do something about it'' wouldn't you ordinarily have done that?

A. Well, please remember, Mr. Nesbett, we were working under extreme duress at the time. If there hadn't been so much confusion I probably would have handled it more efficiently.

Q. More efficiently. Was Mr. Coffey there when you discovered, finally found this letter of July 23rd?

A. Yes, I think he was. If I recall he was outside in June.

Q. Did you go to Mr. Coffey then before you wrote this letter of June 23rd to Tony?

A. No, sir.

Q. He knew nothing about this whole thing?

A. Not until the fire was reported.

Q. Who discovered this letter of June or July 23rd? A. Mary Kaser.

Q. Do you know the circumstances under which she discovered [244] it?

A. As I recall, she brought it to me and asked me if this wasn't the letter that I had been looking for and I asked her where did she find it and she said that it was stuck in Evelyn's desk underneath another file.

Q. Evelyn McCord? A. Yes.

Q. The fire insurance girl? A. Yes.

Q. Underneath another file?

A. Yes, it was under a clip.

Q. Under a clip?

A. Yes, so it appeared to be part of another file.

(Testimony of Grace McConnell.)

Q. I see. And do you know how Mary Kaser happened to find it?

A. She was looking for something else.

Q. On Mrs. McCord's desk? A. Yes.

Q. I believe you testified on your direct examination, Mrs. McConnell, did you not, in response to one of Mr. Renfrew's questions that when you wrote this letter of June 4th, which is Plaintiff's Exhibit 5, you did not have the information that Mr. Polimeni desired to insure three buildings rather than one? A. It wasn't debatable. [245]

Q. Well, as a matter of fact, you had it; it was in the office but you couldn't find it, isn't that it?

A. Yes, sire, we didn't find it to refer to.

Q. Would you consider Mr. Polimeni's restaurant in view of the description contained in the letter of April 17th a greater hazard than the Nenana restaurant?

A. I am not familiar with either location.

Q. Mrs. McConnell, at the time you wrote the letter of July 23rd, Plaintiff's Exhibit 6 wherein you said "We wish to apologize" et cetera, at the time you wrote that letter it would have been possible to obtain insurance for Mr. Polimeni in some company through Mr. Coffey's arrangement, wouldn't it?

A. It turned out that way with the Nenana risk.

Q. It would have been possible, would it not?

A. Assuming that the companies would accept it as they had the Nenana risk. That is an assumption.

Q. Then was that in the back of your mind when

(Testimony of Grace McConnell.)

you said to Tony in the last paragraph of that letter
“Will you kindly give us this information so we
may issue your policies”? A. Yes, sir.

Q. You didn't quite say what you meant then in
the last paragraph of that letter, did you?

A. The word “issue” is used entirely too loosely.

Q. You didn't mean that at all?

A. Not in the sense you did. [246]

Q. Not in the ordinary insurance sense, is that
correct? A. Yes.

Mr. Nesbett: I believe that is all, Your Honor.

Mr. Renfrew: I don't believe I have any exami-
nation, Your Honor.

(Witness excused.)

Mr. Renfrew: I have a witness I haven't called
and I would like to have a five-minute recess so I
could get him here.

The Court: Court will be in recess five minutes.

Mr. Nesbett: Your Honor, may I recall Mrs.
McConnell for one question.

The Court: Yes.

(Grace McConnell resumed the witness stand.)

Q. (By Mr. Nesbett): Mrs. McConnell, with
respect to the Nenana restaurant to which you tes-
tified, isn't it a fact in 1948 they had a very severe
fire in Nenana?

A. I wasn't aware of it, Mr. Nesbett.

Q. You don't know whether there was such a
fire or not? A. No, I don't.

(Testimony of Grace McConnell.)

Q. Do you know the reason for it being so difficult to place that Nenana risk?

A. From our correspondence I concluded it was just because it was an unprotected restaurant. [247]

Mr. Nesbett: I see, thank you.

Further Redirect Examination

By Mr. Renfrew:

Q. In that connection, Mrs. McConnell, were there any other unprotected restaurants cancelled that spring that you had covering on?

A. Yes, we had Fire Lake Lodge. Do you want the particulars?

Q. Just state briefly what occurred in that risk, was that an unprotected restaurant?

A. The Fire Lake Lodge is right up the highway and I understand that it is both a restaurant and cocktail bar.

Q. Yes.

A. From May 14, '47, to May 14, '48, we had a policy in the American Home. When it expired we automatically renewed it in our office at the request of our insured and we receipted for wire from Gould & Gould reading "Cancel Immediately American Home Policies 4263 and 4264 Best American Cannot Write."

Q. There haven't been any big fires at Fire Lake that you know of, have there?

A. Not at that time.

Q. On your previous examination by Mr. Nes-

(Testimony of Grace McConnell.)

you said to Tony in the last paragraph of that letter
“Will you kindly give us this information so we
may issue your policies”?

A. Yes, sir.

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Q. On your previous examination by Mr. Nes-

(Testimony of Grace McConnell.)

bett you testified that you might have been able to have handled this man's more efficiently, do you have any explanation to make of how you could handle this more efficiently? [248]

A. The only thing I can think of would be instead of writing Mr. Polimeni we could have wired him for that information again.

Q. You could have done that? A. Yes, sir.

Mr. Renfrew: I think that is all.

Further Recross-Examination

Q. (By Mr. Nesbett): Mrs. McConnell,—this causes me to ask just a few more questions, Your Honor—Mrs. McConnell, you say you automatically renewed the policies on the Fire Lake property?

A. Yes, sir.

Q. That was unprotected property—bar and restaurant—wasn't it?

A. But the American Home had not yet told us they wouldn't write it.

Q. You had the right to bind the American Home?

A. We could renew anything automatically that was already accepted by the Company unless we had previous instructions otherwise.

Q. Without checking with the Company at all?

A. No.

Q. Could you have written an unprotected restaurant binding the American Home for \$1500 or \$2500?

A. No, we never bind a new risk. [249]

(Testimony of Grace McConnell.)

Q. Could you have done that with any of your companies? You had that power with some of them, didn't you?

A. Based on verbal instructions when I was in Seattle before I came to Anchorage——

Q. No, I am asking you, Mrs. McConnell, if as office procedure, you were office manager and Mr. Coffey was away quite a bit of the time, didn't you have the power to bind some of these companies that he represented as agent?

A. We had the power to bind subject to instructions.

Q. As Mr. Coffey testified some \$1500 and some \$2500, isn't that correct? A. There were two.

Q. Isn't it a fact that in the spring or summer of 1948 the Fire Lake had quite a disastrous fire at Fire Lake Lodge?

A. I don't believe it was before May, 1948.

Q. Well—yes, it would have been before the expiration of their policy, would it not, their policy expired in May of 1948 and you automatically renewed them, didn't you, May 14, '47, to May 14, '48?

A. Yes, sir.

Q. And isn't it a fact that before the expiration of the policies on May 14, '48, that three or four cabins burned at Fire Lake, burning up at least one man?

A. But they weren't carrying any insurance on the cabins; they were carrying it on the main building. [250]

Q. But that does—did occur, didn't it?

(Testimony of Grace McConnell.)

A. I recall the fire; I don't recall the date.

Q. When you say you could have handled it more efficiently by wiring, Mrs. McConnell, isn't it a fact that you could have handled it much more efficiently if when you received Mr. Polimeni's wire of June 1st saying "What cooks with respect to my insurance" and you answered or directed Mrs. McCord to answer on June 4th, you could have told him to tell us in that letter—Mr. Polimeni, you say the allocation on the insurance on each of those three buildings, you could have done that, couldn't you?

A. Yes.

Further Redirect Examination

By Mr. Renfrew:

Q. You would have had to remember it, however, in order to do it? A. Yes, sir.

Mr. Renfrew: I want to call Mr. Polimeni for about two questions.

Mr. Nesbitt: Do you need Bill Smith?

Mr. Renfrew: I don't think we need Bill Smith.

ANTONIO POLIMENI

Further Recross-Examination

By Mr. Renfrew:

Your Honor, I want to ask this man from whom he bought this restaurant. Does Your Honor wish to ask the [251] question of him? He seems to be hard of hearing. Do you hear me?

A. A little bit. I hear it now.

(Testimony of Antonio Polimeni.)

Q. Who did you buy the restaurant from?

A. Restaurant, Billy Reagan.

Q. You bought it from Billy Reagan?

A. Commission. I remember Billy Reagan, suppose to give. He gave it to me too because I work for him, cook for the kid until the cook fellows got back every year to send to school. Every morning and then Billy promise, on the 15th he says. In '32 he got some mixed up with Charles Once, you see. I say Charles Once the rest of our restaurant and forget it. Well, Billy Reagan he passing away in years—a couple of years—the restaurant belong to you. To fellows he promised it to me. After awhile he said “I think Tony you had better be buying it” you see, previous to that Mrs. Davis she tell—Billy told her. I was here. I seen her a little while ago.

Q. Wait just a moment.

A. Freida——

Q. Stop, cease and desist. You bought the restaurant from Billy Reagan?

A. Yes, the Commissioner.

Q. Did you get any paper? A. What?

Q. Did you get any paper from him? [252]

A. He got a receipt paid up, bought them up everything. Burned up everything.

Q. Did the paper—Did the paper you got from Billy Reagan burn up? A. He die.

Q. You got the paper from Marchbanks?

A. A receipt.

Q. Did that burn up? A. Burn up.

Mr. Renfrew: That is all.

(Testimony of Antonio Polimeni.)

Mr. Nesbett: Your Honor, while Mr. Polimeni is on the stand, I wonder if I could go into that matter that I made an offer of proof on?

The Court: The only way, you can make an offer of proof.

Mr. Nesbett: Rather than that, Your Honor suggested that I make an offer of proof?

The Court: Yes, but not by asking the witness questions.

Mr. Nesbett: I understand that, Your Honor, but may I ask him the questions now?

The Court: For what purpose?

Mr. Nesbett: To further bear out our contention.

The Court: That overlooks the fact that I have ruled against it and so your only recourse is to make an offer of [253] proof.

Mr. Renfrew: Call Mr. Dan Cuddy.

DANIEL CUDDY

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Renfrew:

Q. Mr. Cuddy, your name is Daniel Cuddy?

A. That is correct.

Q. You are an attorney practicing in Anchorage?

A. That is correct.

Q. I will ask you whether or not the firm with which you are connected administered the—was at—

(Testimony of Daniel Cuddy.)

torney for the Administrator of the Estate of William Reagan? A. They are and were.

Q. As attorney for that estate do you have copies of the files? A. Yes, sir.

Q. Will you state the approximate date of the demise of Mr. Reagan?

Mr. Nesbett: Your Honor, I think Mr. Cuddy should be qualified to testify. There is no testimony that he has acted as attorney for these estates and it is common knowledge that he has only been in the office a very short while. He may not know about these estates at all and may not be qualified to [254] testify.

The Court: I am not sure that I get your objection. He could learn of the facts to which he has already testified without being in the office from the time that they were retained for this purpose.

Mr. Nesbett: Then there is nothing to show that the files in Mr. Cuddy's possession now are the complete file on the Reagan Estate and how would he know if he didn't act as attorney for the Administrator?

The Court: He would be in the same position of any custodian of records who succeeds another custodian, he wouldn't be precluded from going beyond or prior to his tenure of office. Objection is overruled.

Mr. Nesbett: Is he the custodian though, Your Honor?

The Court: Well, I thought that your objection was based on the—on his status as a custodian or

(Testimony of Daniel Cuddy.)

the fact that his custody didn't go back far enough and I hold that that objection is not well taken. Go ahead.

Q. (By Mr. Renfrew): Do your records from the file of your office show the date of the demise of Mr. Reagan?

A. They would, I would have to check on it. He died to my recollection in '42 or '43, quite a while ago.

Q. Have you checked the inventory and appraisal in his estate to determine whether or not he had any interest [255] in any restaurant building or any building in South Naknek, Alaska?

A. Yes, I did.

Q. Did he or did he not have any at the time of his death?

A. The inventory which was not prepared by our office did not show an interest in the restaurant.

Q. Now, since the administration has started have you corresponded with the United States Commissioner at Naknek, Mr. Marchbanks, with regards to this so-called restaurant property in South Naknek?

A. I have.

Q. And do you have a reply from Mr. Marchbanks in his capacity as United States Commissioner with reference to that property?

A. I have.

Q. And what is the date of that reply?

A. August 23, 1948.

Q. And what does that reply state, if anything, with regards to the property at South Naknek?

Mr. Nesbett: I object, Your Honor, to this unless

(Testimony of Daniel Cuddy.)

it is pinned down to be the same property that is involved in this case; there is nothing to show that it is.

The Court: I assume that he would certainly identify it as such so that if the ground of your objection is that the Court will have to overrule it. [256]

Mr. Nesbett: If Your Honor please, South Naknek restaurant property, it is impossible for Mr. Cuddy to know whether it is the same property or not.

The Court: My ruling indicates that it is just the situation where the witness or the attorney questioned cannot be expected to bring out everything in one question and answer; they have to have the opportunity and so on that ground the objection is overruled.

Mr. Renfrew: I will go into it a little further, Your Honor, and help Mr. Nesbett clear it up; maybe it isn't clear to the Jury.

Q. Are you familiar with that file to the extent of having knowledge concerning the file?

A. I am quite familiar with the file.

Q. Do you know Mr. Polimeni claimed an interest in a restaurant in South Naknek?

A. I know that a man informed me that Billy Reagan had an interest in a restaurant and I wrote Mr. Marchbanks who originally filed the administration of this estate to ask him for information and why it was not included in the inventory?

(Testimony of Daniel Cuddy.)

Q. And what was his reply?

A. I might add there was another item that is included in this with regard to a \$400 check of Mr. Polimeni.

Q. State that again?

A. There was a \$400 check that turned up in the files [257] when I took over the administration of the estate handling it for the administrator.

Q. Yes.

A. And I had asked Mr. Marchbanks also about this check.

Q. The check was made payable to who?

A. It was payable to Mr. Polimeni.

Q. Polimeni? A. Yes.

Q. Now, in connection with that and in connection with the restaurant in South Naknek, did you inquire of Mr. Marchbanks as to whether or not Reagan or his estate had any interest in the South Naknek Restaurant property?

A. I did and this is the answer I got:

“Dear Mr. Cuddy:

“In answer to your letter of June 9, 1948, concerning the check you are holding for Antonio Polimeni for \$400, will you kindly return the check to my office. According to our records William B. Reagan, deceased, has no interest in the restaurant at South Naknek, Alaska. The other estate to which the restaurant belongs has never been administered. All papers concerning the William B. Reagan Estate which you mailed us under date of June 3, 1948,

(Testimony of Daniel Cuddy.)

have been properly filed * * *." And then it goes on to some other matters.

Q. What is the date of that letter from Mr. Marchbanks? A. August 23, 1948. [258]

Mr. Renfrew: That is all, Mr. Cuddy. Your witness.

Cross-Examination

By Mr. Nesbett:

Q. What does the other estate refer to?

A. It doesn't state in this letter.

Q. You don't recall whether you represent the Administrator for that other estate then?

A. It was never probated, to my knowledge.

Q. If you don't know which estate it was how do you know it was never probated?

A. Mr. Marchbanks said it never was.

Q. You don't know the name of the estate even?

A. No, sir.

Q. What did you do with that check for \$400?

A. Mailed it back to Mr. Marchbanks.

Q. And has anything been done on the estate since August of 1948?

Mr. Renfrew: What estate?

Mr. Nesbett: The only estate involved here—Reagan's Estate.

A. It is—the order of distribution has been entered.

Q. And when was that done?

A. That was done about three months ago.

Q. And has Marchbanks signed it?

(Testimony of Daniel Cuddy.)

A. Marchbanks is no longer the Commissioner. [259]

Q. Who is handling it now as Commissioner?

A. A woman by the name of Helen Tibbetts.

Mr. Nesbett: No further questions.

Mr. Renfrew: That is all Mr. Cuddy.

(Witness excused)

Mr. Renfrew: We rest, Your Honor.

The Court: Have you any rebuttal?

Mr. Nesbett: I thought Mr. Coffey would take the stand or they would have another witness. May I have five minutes to go through my notes and see if I have any rebuttal?

Mr. Renfrew: What was that first remark?

The Court: He said something to the effect that he thought Mr. Coffey would take the stand.

Mr. Nesbett: What I want is a few minutes.

The Court: Do you want a five minute recess?

Mr. Nesbett: Mr. Bill Smith.

BILL SMITH

previously called as a witness, being previously sworn, resumed the stand and testified as follows:

Further Redirect Examination

By Mr. Nesbett:

Q. You heard Mr. Cuddy's testimony that he was attorney for the Administrator of the Estate of William Reagan did you not? A. Yes. [260]

(Testimony of Bill Smith.)

Q. You heard his testimony that Mr. Reagan died in 1942 did you not? A. Yes.

Q. I will ask you whether or not you were in Naknek when Mr. Reagan died? A. Yes.

Q. What year did he die? A. 1946.

Q. How do you know that, Mr. Smith?

A. Mr. Reagan had been very ill for sometime with cancer and he had trouble with his circulation, couldn't walk, he would come into Anchorage to the Providence Hospital and spend some time there and Mr. Phillips of the Alaska Packers Association had come in to consult the hospital about Mr. Reagan's condition.

Mr. Renfrew: Objected to as hearsay.

The Court: Objection is sustained.

Q. (By Mr. Nesbett): Were you there when that happened?

Mr. Renfrew: What happened?

Q. (By Mr. Nesbett): The hospital visit?

A. Yes, sir, I hauled Mr. Phillips.

Q. You hauled him in your plane?

A. Not all the way to Anchorage, just to the Naknek [261] Air Base.

Mr. Renfrew: I made an objection, Your Honor.

The Witness: I can qualify it.

The Court: This is another question now, is it not?

Mr. Renfrew: No.

Mr. Nesbett: I asked did you haul him to Anchorage in your airplane?

A. I didn't haul him all the way to Anchorage.

(Testimony of Bill Smith.)

Q. How far did you haul him?

A. To the Naknek Air Base.

Q. What year was that? A. 1946.

Q. Was he ill at that time?

A. You are speaking of Mr. Reagan?

Q. Mr. Reagan, yes, sir.

A. Oh, yes, he was ill. I had reference to Mr. Phillips to the Base.

Q. Well, tell us how you know Mr. Reagan died in 1946?

A. Mr. Phillips brought Mr. Reagan back to Naknek to straighten the accounts of the Alaska Packers and I had my airplane parked on the beach.

Mr. Renfrew: Your Honor, to simplify this thing, I will stipulate, if you know when he died, the date that he did die. I can't see that it is material. As I recall Mr. Cuddy's testimony he said he would have to check through [262] the records. If you say you saw him die I will stipulate.

Q. (By Mr. Nesbett): All right, what part of 1946 did he die?

A. He died in the latter part of the summer.

Q. Of '46, you know that yourself?

A. Yes.

Mr. Renfrew: I will stipulate to that fact.

Mr. Nesbett: Thank you.

Q. Was Mr. Reagan Administrator of any estates in and around Naknek? A. Yes.

Q. What estates to your knowledge?

A. Heinz Smchook Estate.

(Testimony of Bill Smith.)

Q. And was Mr. Marchbanks the United States Commissioner handling those estates also?

A. Yes.

Q. And do you know whether or not the Heinz Smchook Estate had any interest in this property which later became Tony's?

A. I don't know positively.

Mr. Nesbett: That is all, Your Honor.

Mr. Renfrew: That is all.

Mr. Nesbett: We rest, Your Honor.

Mr. Renfrew: We rest. I wish to renew my motions, Your Honor.

The Court: Have you anything further to [263] add than what you already stated?

Mr. Renfrew. I have nothing further to add except that I can talk for two hours and one half on what we have already stated. I can't see, Your Honor, that there is a possible question here to go to the jury.

Mr. Nesbett: I object to any argument in front of the jury.

The Court: The motion is denied.

Mr. Nesbett: I, of course, Your Honor, want to make my statement to Your Honor as an offer of proof, is that sufficient or shall I restate it in the absence of the jury?

The Court: The offer should be, of course, made in the usual way and from what I recall of its character it is not something that would be improper to make in the presence of the jury unless counsel objects.

Mr. Renfrew: Your Honor, when the plaintiff said that he rested I assume that he meant what he said. If he wishes to reopen his case I can see this matter going on ad infinitum practically. If he wishes to reopen his case to make an offer of proof then the Court has practically walked down off the bench and told him how. If he wants to make an offer and he is allowed to make it then the case is reopened and we have to submit evidence in opposition to it, if the Court allows it.

The Court: I have already said that I wouldn't allow [264] it to be introduced but, of course, he has the right to make an offer.

Mr. Renfrew: He is doing that, I suppose, for the purpose of the record, and the record only?

The Court: Yes.

Mr. Renfrew: Then what is the purpose, Your Honor, in doing it in any way other than the proper way?

Mr. Nesbett: I don't know, Your Honor, whether you want to dismiss the jury or whether we should come to the bench and make it.

Mr. Renfrew: I think an offer of proof in any other way than one way, unless I don't know how you do it, and I think that is in writing. I will explain it if it is necessary.

The Court: It will have to be in writing or at the bench unless of such a character that it could probably be made in the presence and hearing of the jury and from what you have said of your offer heretofore it seems to me it could be made in the presence of the jury without any prejudice what-

ever ensuing. Now, if, however, you object to it being made in the presence of the jury then counsel should come to the bench and make it.

Mr. Renfrew: I certainly object to that offer being made in the presence of the jury.

The Court: All right, you may make it at the bench. [265]

(Counsel approached the bench.)

Mr. Nesbett: I desire, Your Honor, to offer proof of the following facts by the testimony of Mr. Polimeni himself, the plaintiff, that in the latter part of the year, 1947 or of early in the year 1948, Mr. Polimeni travelled to Anchorage to discuss with Mr. Coffey or his assistants payment of Mr. Polimeni's claim for insurance as a result—

The Court: You don't have to include why he came to Anchorage. The only thing is just state what you intend.

Mr. Nesbett: I am right to that now—payment of this claim; that while in Mr. Coffey's office he talked with Mr. Coffey and stated to Mr. Coffey that he, Mr. Polimeni, had a restaurant in Naknek which he desired to insure with Mr. Coffey; that Mr. Coffey agreed that he would insure it and asked if Mr. Polimeni wanted it insured then. Mr. Polimeni replied that he still had a little work to do on the restaurant and wanted to find out exactly what he had in it and that he would take the matter up with Coffey later; that Coffey agreed to take the matter up for Mr. Polimeni at a later date.

The Court: Having already ruled that no action

lies on contract and it being obvious that this testimony would be admissible only if that action were still in the case, the offer is declined because it is irrelevant now.

(Counsel returned to the counsel tables.) [266]

United States of America,
Territory of Alaska—ss.

I, Oren J. Casey, the Official Court Shorthand Reporter for the District Court of the United States, Third Division, Territory of Alaska, hereby certify the above and foregoing pages numbered 189 through 266 to be a true, complete and correct transcript of the testimony taken in the above-entitled action on the 20th day of April, 1950.

/s/ OREN J. CASEY,

Certified Shorthand Reporter.

[Endorsed]: Filed August 15, 1950. [267]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, M. E. S. Brunelle, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceedings, and including specifically the complete record and file of such action, including the reporter's transcript of the evidence introduced on the trial of the cause, and all the exhibits introduced by the respective parties, namely plaintiff's exhibits 1 to 9, inclusive, and defendant's exhibits A and B, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled cause by the above-entitled Court on April 27, 1950, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: No. 12659. United States Court of Appeals for the Ninth Circuit. Edward D. Coffey, Appellant, vs. Antonio Polimeni, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed August 21, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12659

EDWARD D. COFFEY,

Appellant,

vs.

ANTONIO POLIMENI,

Appellee.

APPELLANT'S DESIGNATION OF POINTS
UPON WHICH HE INTENDS TO RELY
ON APPEAL

Comes now appellant, Edward D. Coffey, and pursuant to Rule 19 of the above-entitled Court, sets forth the points upon which he intends to rely on this appeal, namely:

1. That appellant was under no duty to attempt to procure insurance for appellee, Antonio Polimeni,

and accordingly plaintiff's attempted statement of a cause of action against defendant-appellant Coffey on the ground of alleged negligence does not state any cause of action in favor of the plaintiff-appellee and against the defendant-appellant, and such attempted cause of action should have been dismissed, by the Court, on motion of defendant-appellant.

2. That the Court erred in refusing to grant the motion of defendant-appellant for dismissal of the action, or for direction of verdict in favor of appellant, such motion having been made at the close of plaintiff's case and at the close of all the evidence.

3. That in any event there is no evidence in this cause showing any duty of appellant toward appellee or showing any negligence of appellant in connection with the matter attempted to be alleged by plaintiff-appellant, or, in the alternative, if the Court should find that there was a duty owing by appellant to appellee sufficient to support an action in negligence by appellee against appellant that on the face of the record appellee was guilty of such contributory negligence that the Court should have decided as a matter of law that no recovery could be had against appellant by appellee in connection with such alleged negligence.

4. That the Court erred in submitting the matter to the jury at all.

5. That the Court erred in accepting the verdict of the jury.

6. That the Court erred in entering judgment in favor of appellee and against appellant in this matter.

7. That the Court erred in overruling appellant's motion to set aside the verdict and the judgment, and in refusing to enter judgment in favor of appellant, notwithstanding the verdict.

8. That the Court erred in refusing to grant a new trial in the matter on the request of appellant.

9. That the verdict as rendered by the jury, if in fact any verdict in favor of appellee and against appellant is justified, is grossly excessive, is not supported by any substantial evidence, and is such that it must necessarily have been rendered as a result of sympathy or passion or prejudice.

Respectfully submitted,

DAVIS & RENFREW,
Attorneys for Defendant-Appellant, Edward D.
Coffey,

By /s/ EDWARD V. DAVIS.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 28, 1950.

[Title of Court of Appeal and Cause.]

STIPULATION CONCERNING PRINTING OF RECORD

It is hereby stipulated and agreed by and between Davis & Renfrew, attorneys for the appellant, and McCutcheon & Nesbett, attorneys for the appellee, that the entire record in the above matter as submitted to the Court of Appeals by the District Court, together with this stipulation and together with appellant's designation of points, shall be printed, except those certain portions hereinafter particularly set forth which are not material to the determination of the questions raised by the appeal of this matter, or which are duplications of other portions of the record and may be omitted from the printed record by the Clerk of the above-entitled Court as follows:

1. The printed paper marked "Judgment Roll."
2. Summons directed to defendant dated February 11, 1949, filed February 16, 1949.
3. Summons dated April 7, 1949, and filed April 19, 1949.
4. Stipulation for extension of time to answer.
5. Minute Order of the Court, setting all cases for trial one to follow another.
6. Demand for jury trial.
7. Stipulation concerning amount of supersedeas bond.

8. Order setting amount of supersedeas bond, such order being dated May 24, 1950.

9. Supersedeas bond filed by appellant.

That in addition to the portions of the record which need not be printed by stipulation of the parties as above set forth, appellant requested that certain other portions of the record not be printed by reason of the fact that such portions are duplications of parts of the record which are being printed, and that such portions which appellant would have omitted are as follows:

1. Exhibit A attached to plaintiff's complaint, for the reason that such exhibit is a duplicate of letter dated April 17, 1948, written by Antonio Polimeni to Edward D. Coffey, which has been introduced into evidence in this matter as plaintiff's Exhibit III, which is being printed.

2. Exhibits I, II, III, IV, V, VI, VII, VIII and IX attached to defendant's Answer, by reason of the fact that all of such exhibits are duplicated by plaintiff's Exhibits I through IX, inclusive, introduced at the trial, save and except Form Number 7080, which is part of Exhibit Number II attached to defendant's Answer, and of which a duplicate has been admitted into evidence in this matter as defendant's Exhibit B, which are being printed.

3. Minute Order dated April 17, 1950, concerning drawing of the Jury, for the reason that a legal jury was admittedly drawn and the Minute Order

concerning drawing of the jury is immaterial on this appeal.

4. Minute Order dated April 17, 1950, concerning the swearing of the jury, for the reason that a legal jury was admittedly drawn and sworn and the Minute Order concerning the swearing of the jury is immaterial on this appeal.

5. Subpoena for the attendance of Joseph Sheahan as a witness, for the reason that Joseph Sheahan was admittedly called as a witness on behalf of plaintiff, and the actual subpoena issued by the Court for his appearance is immaterial on this appeal.

6. Cost Bill filed by the plaintiff on May 3, 1950, for the reason that there is no question concerning the Cost Bill, and appellant is willing to stipulate that in the event appellant is liable to appellee in accordance with the Judgment, that he is likewise liable to pay the costs according to such Judgment.

Appellee has declined to stipulate for the exclusion of the above-mentioned items 1 through 6, both numbers inclusive, from the printed record, and has requested that they be printed along with other portions of the record.

Dated at Anchorage, Alaska, this 13th day of September, 1950.

DAVIS & RENFREW,
Attorneys for Defendant-
Appellant.

By /s/ EDWARD V. DAVIS.

McCUTCHEON & NESBETT,
Attorneys for Plaintiff-
Appellee,

By /s/ BUELL A. NESBETT.

[Endorsed]: Filed September 18, 1950.